(17)

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM J. CLINTON, ET AL., APPELLANTS

v.

CITY OF NEW YORK, ET AL.

ROBERT E. RUBIN, APPELLANT

v.

SNAKE RIVER POTATO GROWERS, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(WASHINGTON)

CIVIL DOCKET #: 97-CV-2393

THE CITY OF NEW YORK; CITY HALL
NEW YORK CITY HEALTH AND HOSPITALS CORP.
GREATER NEW YORK HOSPITAL ASSOCIATION
JAMAICA HOSPITAL MEDICAL CENTER
DISTRICT COUNCIL 37, AMERICAN FEDERATION
OF STATE, COUNTY AND MUNICIPAL EMPLOYEES
LOCAL 1199 NATIONAL HEALTH AND
HUMAN SERVICE EMPLOYEES UNION, PLAINTIFFS

V.

WILLIAM J. CLINTON, PRESIDENT
OF THE UNITED STATES OF AMERICA
DONNA E. SHALALA, SECRETARY OF
HEALTH AND HUMAN SERVICES
FRANKLIN D. RAINES,
DIRECTOR OF THE OFFICE OF MANAGEMENT AND
BUDGET, DEFENDANTS

THE CITY OF NEW YORK, CITY HALL
NEW YORK CITY HEALTH AND HOSPITALS CORP.
GREATER NEW YORK HOSPITAL ASSOCIATION
JAMAICA HOSPITAL MEDICAL CENTER
DISTRICT COUNCIL 37, AMERICAN FEDERATION
OF STATE, COUNTY AND MUNICIPAL EMPLOYEES
LOCAL 1199 NATIONAL HEALTH AND
HUMAN SERVICE EMPLOYEES UNION, PLAINTIFFS

V.

ROBERT C. BYRD, UNITED STATES SENATOR
DANIEL PATRICK MOYNIHAN,
UNITED STATES SENATOR
CARL LEVIN, UNITED STATES SENATOR
DAN BURTON
UNITED STATES SENATE, MOVANTS

DOCKET ENTRIES

1997

Oct. 16	(1)	COMPLAINT filed by plaintiff THE CITY OF NEW YORK, plaintiff NY CITY HEALTH/HOSP., plaintiff GREATER NY HOSP., plaintiff JAMAICA HOSP. MED., plaintiff DISTRICT COUNCIL 37, plaintiff LOCAL 1199, NATL.; attachment (1) (tth) [Entry date 10/17/97] [1:97cv2393]
		* * * * *
Oct. 21	__	CASE REASSIGNED from Judge Thomas P. Jackson to Judge Thomas F. Hogan (tth) [Entry date 10/22/97] [1:97cv2393]
		* * * * *
Oct. 24	(6)	ORDER by Judge Thomas F. Hogan : directing that Civil Actions 97-2399 and 97-2463 are consolidated with Civil Action 97-2393, for all purposes, before Judge Thomas F. Hogan. (N) (gew) [Entry date 10/27/97] [1:97cv2393]

		* * * * *
Nov. 12	(13)	MOTION filed by federal defendant WILLIAM J. CLINTON in 1:97-cv-02393, federal defendant DONNA E. SHALALA in 1:97-cv-02393, federal defendant FRANKLIN D. RAINES in 1:97-cv-02393, federal defendant USA in 1:97-cv-02399, federal defendant WILLIAM J. CLINTON in 1:97-cv-02399, federal defendant FRANKLIN D. RAINES in 1:97-cv-02399, federal defendant ROBERT E. RUBIN in 1:97-cv-02463 to dismiss complaint [1-1] in 1:97-cv-02463; Declaration (1). (lkn) [Entry date 11/13/97] [1:97cv2393 1:97cv2399 1:97cv2463]
		* * * * *
Nov. 26	(14)	MOTION filed by plaintiff SNAKE RIVER POTATO in 1:97-cv-02463, plaintiff MIKE CRANNEY in 1:97-cv-02463 for summary judgment; Appendix. (lkn) [Entry date 11/28/97] [1:97cv2393 1:97cv2399 1:97cv2463]
		* * * * *
)v. 26	(17)	MOTION filed by plaintiff in 1:97-cv-02393 for summary judgment; Appendix. (lkn) [Entry date 11/28/97] [1:97cv2393]
		* * * * *

Dec. 18	(32)	MOTION filed by federal defendant WILLIAM J. CLINTON in 1:97-cv-02393, federal defendant DONNA E. SHALALA in 1:97-cv-02393, federal defendant FRANKLIN D. RAINES in 1:97-cv-02393, federal defendant USA in 1:97-cv-02399, federal defendant WILLIAM J. CLINTON in 1:97-cv-02399, federal defendant FRANKLIN D. RAINES in 1:97-cv-02399, federal defendant ROBERT E. RUBIN in 1:97-cv-02463 for summary judgment (lkn) [Entry date 12/19/97] [1:97cv2393 1:97cv2399 1:97cv2463]

* * * * *

Dec. 31	__	JOINT MOTION by plaintiff in 1:97-cv-02399, federal defendant in 1:97-cv-02399, plaintiff in 1:97-cv-02399, federal defendant in 1:97-cv-02399 for order granting partial relief and otherwise dismissing action as moot (lkn) [Entry date 01/06/98] [1:97cv2399]

* * * * *

1998

Jan. 14	__	MOTION HEARING before Judge Thomas F. Hogan Reporter: Patricia J. Yerkes (gew) [Entry date 01/16/98] [1:97cv2393]

* * * * *

Jan. 28	(42)	TRANSCRIPT filed for date(s) of 01/14/98. Reporter: Patricia J. Yerkes (lkn) [Entry date 01/29/98] [1:97cv2393]
Feb. 12	(43)	MEMORANDUM OPINION by Judge Thomas F. Hogan (N) (cjp)

* * * * *

Feb. 12	(44)	ORDER by Judge Thomas F. Hogan : directing that the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. (1996), is adjudged and declared unconstitutional; denying motion to dismiss complaint [1-1] in 1:97-cv-02463 [13-1] by federal defendant in 1:97-cv-02393, 1:97-cv-02463, denying motion for summary judgment [32-1] by federal defendant in 1:97-cv-02393, 1:97-cv-02463, granting motion for summary judgment [17-1] by plaintiff in 1:97-cv-02393, granting motion for summary judgment [14-1] by MIKE CRANNEY, SNAKE RIVER POTATO in 1:97-cv-02393, 1:97-cv-02463 (N) (cjp) [1:97cv2393 1:97cv2463]
Feb. 13	(45)	NOTICE OF APPEAL by federal defendant WILLIAM J. CLINTON in 1:97-cv-02393, federal defendant DONNA E. SHALALA in 1:97-cv-02393, federal defendant FRANKLIN D. RAINES in 1:97-cv-02393 to the U. S. Supreme

Court from order [44-1] entered on: 02/12/98. Fee not paid (govt.). (lkn) [Entry date 02/17/98] [Edit date 02/17/98] [1:97cv2393]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(WASHINGTON)

CIVIL DOCKET #: 97-CV-2463

SNAKE RIVER POTATO GROWERS, INC.
MIKE CRANNEY, PLAINTIFFS

v.

ROBERT E. RUBIN, SECRETARY OF
THE TREASURY, DEFENDANT

DOCKET ENTRIES

1997

Oct. 21	(1)	COMPLAINT filed by plaintiff SNAKE RIVER POTATO, plaintiff MIKE CRANNEY (lkn) [Entry date 10/28/97] [1:97cv2463]
		* * * * *
Oct. 24	(3)	ORDER by Judge Thomas F. Hogan: directing that Civil Actions 97-2399 and 97-2463 are consolidated with Civil Action 97-2393, for all purposes, before Judge Thomas F. Hogan. (N) (gew) [Entry date 10/28/97] [1:97cv2463]
		* * * * *
Nov. 12	(13)	MOTION filed by federal defendant WILLIAM J. CLINTON in

1:97-cv-02393, federal defendant DONNA E. SHALALA in 1:97-cv-02393, federal defendant FRANKLIN D. RAINES in 1:97-cv-02393, federal defendant USA in 1:97-cv-02399, federal defendant WILLIAM J. CLINTON in 1:97-cv-02399, federal defendant FRANKLIN D. RAINES in 1:97-cv-02399, federal defendant ROBERT E. RUBIN in 1:97-cv-02463 to dismiss complaint [1-1] in 1:97-cv-02463; Declaration (1). (lkn) [Entry date 11/13/97] [1:97cv2393 1:97cv2399 1:97cv2463]

Nov. 26 (14) MOTION filed by plaintiff SNAKE RIVER POTATO in 1:97-cv-02463, plaintiff MIKE CRANNEY in 1:97-cv-02463 for summary judgment; Appendix. (lkn) [Entry date 11/28/97] [1:97cv2393 1:97cv2399 1:97cv2463]

* * * * *

Dec. 18 (21) MOTION filed by federal defendant WILLIAM J. CLINTON in 1:97-cv-02393, federal defendant DONNA E. SHALALA in 1:97-cv-02393, federal defendant FRANKLIN D. RAINES in 1:97-cv-02393, federal defendant USA in 1:97-cv-02399, federal defendant WILLIAM J. CLINTON in 1:97-cv-02399, federal defendant FRANKLIN D. RAINES in

1:97-cv-02399, federal defendant ROBERT E. RUBIN in 1:97-cv-02463 for summary judgment (lkn) [Entry date 12/19/97] [1:97cv2393 1:97cv2399 1:97cv2463]

* * * * *

Dec. 31 — JOINT MOTION by plaintiff in 1:97-cv-02399, federal defendant in 1:97-cv-02399, plaintiff in 1:97-cv-02399, federal defendant in 1:97-cv-02399 for order granting partial relief and otherwise dismissing action as moot (lkn) [Entry date 01/06/98] [1:97cv2399]

* * * * *

1998

Jan. 14 — MOTION HEARING before Judge Thomas F. Hogan Reporter: Patricia J. Yerkes (gew) [Entry date 01/16/98] [1:97cv2463]

* * * * *

Jan. 28 — TRANSCRIPT filed for date(s) of 01/14/98. Reporter: Patricia J. Yerkes (lkn) [Entry date 01/29/98] [1:97cv2393]

Feb. 12 (29) MEMORANDUM OPINION by Judge Thomas F. Hogan (N) (cjp) [1:97cv2393 1:97cv2463]

Feb. 12 (30) ORDER by Judge Thomas F. Hogan : directing that the Line Item Veto

Act, Pub. L. No. 104-130, 110 Stat. (1996), is adjudged and declared unconstitutional; denying motion to dismiss complaint [1-1] in 1:97-cv-02463 [13-1] by federal defendant in 1:97-cv-02393, 1:97-cv-02463, denying motion for summary judgment [32-1] by federal defendant in 1:97-cv-02393, 1:97-cv-02463, granting motion for summary judgment [17-1] by plaintiff in 1:97-cv-02393, granting motion for summary judgment [14-1] by MIKE CRANNEY, SNAKE RIVER POTATO in 1:97-cv-02393, 1:97-cv-02463 (N) (cjp) [1:97cv2393 1:97cv2463]

Feb. 13 (31) NOTICE OF APPEAL by federal defendant ROBERT E. RUBIN in 1:97-cv-02463 to the U.S. Supreme Court from order [30-1], entered on: 02/12/98. Fee not paid (govt.) (lkn) [Entry date 02/17/98] [Edit date 02/17/98] [1:97cv2463]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:97CV02463

SNAKE RIVER POTATO GROWERS, INC.
1010 WEST RIDGE STREET
P.O. BOX 949
BLACKFOOT, ID 83221

MIKE CRANNEY
ROUTE 1, BOX 40-D
OAKLEY, ID 83346,
PLAINTIFFS

v.

ROBERT E. RUBIN,
SECRETARY OF THE TREASURY
15TH STREET AND PENNSYLVANIA AVENUE
WASHINGTON, D.C. 20220,
DEFENDANT

[Filed: Oct. 21, 1997]

COMPLAINT FOR DECLARATORY RELIEF

Nature of This Action

1. On April 9, 1996, President Clinton signed into law the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 120. That legislation, codified at 2 U.S.C. § § 691 *et seq.*, gives the President authority to "cancel in whole," at any time up to five days (excluding Sundays) after signing a bill, any limited tax benefit, dollar amount of appropriation, or item of new direct

spending contained in the bill. Canceling items in a bill renders them without legal force or effect. The Act provides that "any individual adversely affected by the [Act] may bring an action" in this Court to challenge the Act's constitutionality.

2. On August 5, 1997, then President signed into law the Taxpayer Relief Act of 1997, Pub. L. 105-34, 111 Stat. 788 ("TRA"). Section 968 of that Act amended the Internal Revenue Code to allow the owner of the stock of a qualified agricultural refiner or processor to defer recognition of gain on the sale of such stock to an eligible farmers' cooperative. On August 11, 1997, the President identified this provision as a "limited tax benefit" within the meaning of the Line Item Veto Act and canceled it in its entirety.

3. This cancellation has injured the plaintiffs, an eligible farmers' cooperative organized to purchase agricultural processing facilities, and an individual member of the cooperative. The cancellation makes it more difficult for plaintiffs to purchase qualified processors by eliminating the right of potential sellers to defer taxes on their gains, and plaintiffs have already lost one significant business opportunity as a result of the cancellation. Plaintiffs seek a declaration that the Line Item Veto Act violates Article I of the U.S. Constitution by giving the President an impermissible unilateral power to revise and repeal federal law, and that the purported cancellation of the cooperative taxation provision was without effect.

Jurisdiction and Venue

4. This Court has subject matter jurisdiction pursuant to 2 U.S.C. § 692(a)(1) and 28 U.S.C. § 1331.

5. This court may enter a declaratory judgment under 2 U.S.C. § 692(a)(1) and 28 U.S.C. § 2201.

6. Venue in this Court is proper pursuant to 2 U.S.C. § 692(a)(1).

Parties

7. Plaintiff Snake River Potato Growers, Inc. ("Snake River") is a cooperative association incorporated under Idaho law with its principal offices at 1010 West Bridge Street, Blackfoot, Idaho. Its membership consists of approximately 30 potato growers located throughout Idaho, who each own shares of the cooperative. Snake River is an "eligible farmers' cooperative" within the meaning of Section 968 of TRA. Snake River brings this action on behalf of itself and its member growers.

8. Plaintiff Mike Cranney is a potato grower with farms located in Cassia County, Idaho. He also grows sugar beets, grains, and other crops. He is a member, Director, and Vice Chairman of Snake River.

9. Defendant Robert E. Rubin is the Secretary of the Treasury and is sued in his official capacity. In his official capacity, defendant Rubin is responsible for executing the President's cancellations of "limited tax benefits" under the Act and for executing and enforcing the tax laws of the United States.

Facts

A. The Line Item Veto Act

10. The Line Item Veto Act provides that the President may, immediately or within five days (excluding Sundays) after signing a bill into law, "cancel" any "limited tax benefit" contained in that bill. 2 U.S.C. § 691(a). A "limited tax benefit" is defined, with some exceptions, as (1) a "revenue-losing [tax] provision which" benefits "100 or fewer beneficiaries in any fiscal year or (2) a "Federal tax provision

which provides temporary or permanent transition relief for 10 or fewer beneficiaires in any fiscal year." *Id.* § 691e(9)(A). The Act provides that the President's cancellation of a limited tax benefit prevents it "from having legal force or effect." *Id.* § 691e(4).

B. Section 968 of the Taxpayer Relief Act and Its Cancellation

11. Section 968 of the TRA (entitled "Nonrecognition of Gain on Sale of Stock to Certain Farm Cooperatives," and hereinafter referred to as "Section 968") amended the Internal Revenue Code to allow owners of agricultural refining or processing companies to defer paying taxes on their gains when they sell these companies to eligible farmers' cooperatives. The President signed Section 968 into law on August 5, 1997.

12. On August 11, 1997, exercising his purported authority under the Line Item Veto Act, the President "canceled" Section 968 "in its entirety." On that date, the President transmitted a special message containing Cancellation No. 97-2 to the President of the Senate and the Speaker of the House of Representatives. As provided by the Line Item Veto Act, Section 968 ceased "having legal force or effect" upon transmission and receipt of the special message.

C. Effect of the Cancellation on Plaintiffs

13. Snake River was formed in May 1997 to assist Idaho potato growers in marketing their crops and stabilizing prices, in part through a strategy of acquiring potato processing facilities. Such acquisitions allow individual growers to aggregate their crops and process and deliver them to market jointly. These acquisitions also enable the individual members of Snake River to retain revenues formerly paid out to third-party processors.

14. As an individual potato grower and member of Snake River, Cranney benefits from Snake River's acquisition of potato processing facilities by being able to combine his crops with those of other growers for more efficient processing and marketing, while retaining a share of the processing revenues. In addition to his participation in Snake River, Cranney can obtain similar benefits for his other crops by forming cooperatives with other growers to purchase the facilities of the processors and refiners whom they are currently supplying with crops.

15. Had it not been canceled, Section 968 would have made it significantly easier for Snake River to carry out its planned purchases of the facilities of the processors whom their members currently supply. Section 968 would have allowed a processor to sell its facilities to Snake River without having to pay tax currently on any gain, which would have allowed Snake River to offer and would have encouraged a processor to accept a lower price for those facilities. As a result of the cancellation of Section 968, however, Snake River must generally pay more for these purchases because the sellers will owe taxes currently on any gain on the sales. The business opportunity farmers' cooperatives have lost as a result of the cancellation of Section 968 is significant: in his cancellation message, the President estimated that sellers could have used Section 968 to defer paying $98 million in taxes over the next five years, and $155 million over the next ten.

16. The President's cancellation of Section 968 has concretely interfered with at least one transaction that Snake River had planned. Beginning in May

1997, when Congress was first considering the proposals in Section 968, Cranney and another officer of Snake River discussed with Howard Phillips, a principal owner of Idaho Potato Packers ("IPP"), the purchase by Snake River of the stock of a company owning an IPP potato processing facility in Blackfoot, Idaho. This company would have been a "qualified processor" under Section 968. Phillips was interested in pursuing the sale because he could defer taxes on his gain if Section 968 passed. Snake River anticipated that it would complete the purchase if Section 968 passed. The negotiations did not continue as a result of the President's cancellation of Section 968; Snake River would have to increase its purchase offer in order to compensate Phillips for the taxes he would owe currently on such a sale without Section 968. Snake River thus lost a significant business opportunity as a result of the President's cancellation of Section 968.

17. Cranney has similarly been harmed by the cancellation of Section 968. As a general matter, it is now harder both for Snake River to purchase processing facilities for his potato crops, and for him to do the same through other cooperatives with respect to his other crops. And because of the cancellation's interference with Snake River's purchase of the Idaho Potato Packers facility, Cranney has also lost his share of potential processing revenues as well as the efficiencies of being able to aggregate his potato crops with other growers' for processing.

Claim for Relief

18. The Line Item Veto Act grants the President the power to allow some parts of a bill that both Houses of Congress have passed and he has signed to become law, and to cancel other parts of the same bill and return them to Congress. Whether this power is viewed as a unilateral power of line-item revision of bills that have been presented for his signature, or as granting him a unilateral power to repeal portions of duly enacted laws, the Act grants powers to the President that contravene the constitutional process for making federal law.

19. Article I of the Constitution provides a "single, finely wrought and exhaustively considered procedure" for making or changing federal law. *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. 919, 951 (1983). It vests all federal legislative powers in Congress made up of two Houses. It requires that each bill pass by majority vote in both houses before it may become law. The Presentment Clause of Article I (Art. I, sec. 7, cl. 2) then requires that the bill be presented to the President, and it gives him only three choices: to "approve" the whole bill as it stands and sign it; to "return" (*i.e.* veto) the whole bill; or to allow the whole bill to become law without his signature. The requirement of bicameral passage and presentment to the President applies to the repeal of provisions of law, as well as their enactment or amendment.

20. The Line Item Veto Act violates Article I. The Act unconstitutionally expands the President's power with respect to certain bills presented to him: under the Act, he may "approve" these bills and sign them into law and, at the same instant or up to five days later, may disapprove and "return" parts of these bills, so that the disapproved parts of the bills do not have the force and effect of law. The Act also violates the requirement of bicameral passage and presentment by granting to the President unilateral author-

ity to "cancel" and thus repeal provisions of federal law.

Prayer for Relief

Wherefore Plaintiffs pray

(1) For a declaratory judgment that the Line Item Veto Act is unconstitutional, that the President's purported cancellation of Section 968 of the Taxpayer Relief Act of 1997 is invalid, and that Section 968 remains valid law.

(2) For reimbursement of their costs in this action and for such other relief as the Court may deem appropriate.

Respectfully submitted,

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DATE: October 21, 1997

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:97CV02393

THE CITY OF NEW YORK
CITY HALL
NEW YORK, NY 10007

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION
125 WORTH STREET
NEW YORK, NY 10013

GREATER NEW YORK HOSPITAL ASSOCIATION
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DISTRICT COUNCIL 37, AMERICAN FEDERATION
OF STATE, COUNTY AND MUNICIPAL EMPLOYEES
125 BARCLAY STREET
NEW YORK, NY 10007

LOCAL 1199, NATIONAL HEALTH AND HUMAN
SERVICE EMPLOYEES UNION
310 WEST 43RD STREET
NEW YORK, NY 10036, PLAINTIFFS

v.

WILLIAM J. CLINTON
PRESIDENT OF THE UNITED STATES OF AMERICA
THE WHITE HOUSE
WASHINGTON, DC 20500

DONNA E. SHALALA
SECRETARY OF HEALTH AND HUMAN SERVICES
200 INDEPENDENCE AVENUE S.W.
WASHINGTON, DC 20201

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OLD EXECUTIVE OFFICE BUILDING
WASHINGTON, DC 20503, DEFENDANTS

[Filed: Oct. 20, 1997]

COMPLAINT FOR DECLARATORY RELIEF

Preliminary Statement

1. On April 9, 1996, President William J. Clinton signed into law the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 ("Line Item Veto Act"), codified at 2 U.S.C. § 691. The Line Item Veto Act gives the President authority to "cancel," within five days after signing a bill into law, "any dollar amount of discretionary budget authority; . . . any item of new direct spending; or . . . any limited tax benefit" contained in the law.

2. On August 11, 1997, President Clinton for the first time exercised his authority under the Line Item Veto Act. After signing into law the Balanced Budget Act of 1997, Pub. L. 105-33 ("Budget Act"), the President cancelled a provision, Section 4722(c), which had established that certain New York State expenditures derived from certain health care provider taxes qualified for federal financial participation under the Medicaid program. Cancellation of Section

4722(c) results in exposure to additional liabilities of millions of dollars, primarily imposed upon facilities which provide care to needy and uninsured individuals. It will also have a substantial adverse economic impact on the employees of such institutions, the populations they serve, and the health and well-being of residents of the City of New York.

3. Plaintiffs seek a declaration that the Line Item Veto Act, and the President's purported exercise of his authority thereunder, violates Article I of the Constitution of the United States, both by impermissibly expanding the power of the President and by infringing the requirements of bicameral passage and presentment insofar as it permits the President, without legislative action, to repeal duly enacted federal law.

Jurisdiction and Venue

4. The Court has subject matter jurisdiction pursuant to 2 U.S.C. § 692(a)(1) and 28 U.S.C. § 1331.

5. This Court may enter a declaratory judgment pursuant to 2 U.S.C. § 692(a)(1) and 28 U.S.C. § 2201.

6. Venue in this Court is proper pursuant to 2 U.S.C. § 692(a)(1).

Parties

7. Plaintiff the City of New York ("City") is a municipal corporation organized and existing under the laws of the State of New York.

8. Plaintiff New York City Health and Hospitals Corporation ("NYCHHC"), a public benefit corporation organized and existing under the laws of the State of New York, with its principal place of business at 125 Worth Street, New York, New York 10013, is responsible for the operation of public health care

facilities throughout the City of New York, and is a member of plaintiff GNYHA. NYCHHC serves a significant number of Medicaid-eligible individuals and depends on the Medicaid program for a substantial amount of its revenue.

9. Plaintiff Greater New York Hospital Association ("GNYHA") is a New York State not-for-profit association, with its principal place of business at 555 West 57th Street, New York, New York 10019. Its membership consists of over 100 non-profit voluntary and public hospitals and 75 continuing care facilities in New York City and surrounding communities. GNYHA provides technical, administrative, legal and other services to its individual members, and acts on behalf of all its members as a group by promoting or opposing legislation affecting its members, by litigating issues of common concern, by conducting research and gathering and analyzing information about the health care industry in New York State and nationally, and generally by acting to further the goals and interests of its members. GNYHA brings this action on behalf of its member facilities who are and will be adversely affected by the cancellation of Section 4722(c).

10. Plaintiff Jamaica Hospital Medical Center ("Jamaica Hospital"), located in Jamaica, New York, is a 365-bed teaching hospital serving the boroughs of Queens and Brooklyn in the City of New York and is a member of plaintiff GNYHA. It serves a significant number of Medicaid-eligible individuals, and depends on the Medicaid program for a substantial amount of its revenue.

11. Plaintiffs District Council 37, American Federation of State, County and Municipal Employees, and Local 1199, National Health and Human Service

Employees Union, are labor organizations among each of whose members are many employed in health care and related fields in the City of New York.

12. Defendant William J. Clinton is President of the United States of America, with powers set forth in the Constitution of the United States of America, and is sued in his official capacity.

13. Defendant Donna E. Shalala is Secretary of Health and Human Services and is sued in her official capacity. In that capacity, defendant Shalala is responsible for supervising administration of the Health Care Financing Administration ("HCFA") and federal payments under the Medicaid program.

14. Defendant Franklin D. Raines is the Director of the Office of Management and Budget and is sued in his official capacity. In that capacity, defendant Raines is responsible for executing the President's cancellations of budgetary and spending authority under the Line Item Veto Act.

Constitutional and Statutory Framework

15. Article I of the Constitution of the United States, provides, in Section 7, that a bill becomes a law only upon completion of a two-stage process. *First*, the bill must pass both the House of Representatives and the Senate and be presented to the President. *Second*, it must: (a) be signed by the President; or (b) be returned by the President with objection (*i.e.*, vetoed) and then approved by two-thirds of each house of Congress; or (c) remain, neither signed nor returned, with the President for ten days after presentment, provided that Congress has not adjourned during the interval.

16. The Line Item Veto Act provides that the President may, within five days after signing a bill

into law pursuant to the Presentment Clause, "cancel" any dollar amount of "discretionary budget authority" (*i.e.*, appropriations), any item of "new direct spending," or any "limited tax benefit" contained in that law. The act defines "cancel" to mean "rescind" in the case of an appropriation, and "prevent . . . from having legal force or effect" in all other cases. To exercise his authority, the President is required to determine only that the cancellation will reduce the federal budget deficit, not impair essential government functions, and not harm the national interest. 2 U.S.C. § 691.

17. The Balanced Budget Act of 1997 was passed by the House of Representatives on July 30, 1997, was passed by the Senate on July 31, and was sent to President Clinton for his signature on August 1. He signed it into law on August 5. As more fully explained below, Section 4722(c) of the Budget Act provides, in pertinent part, that certain assessments that were collected from New York State health care providers "are deemed to be permissible health care related taxes" rendering them eligible for matching federal health care funds. The President then cancelled Section 4722(c), on August 11.

Facts

18. The federal Medicaid program provides for federal financial participation ("FFP") to match certain State Medicaid expenditures, including those derived from health care provider taxes that meet specified statutory criteria, in particular expenditures derived from taxes that are "broad-based" (*i.e.*, applied to all health care providers within the same class) and "uniform" (*i.e.*, applied equally to all taxed providers). HCFA has challenged the payments of

FFP to New York State in connection with certain revenues collected by the State through taxes or other charges levied on health care providers (including plaintiffs NYCHHC and Jamaica Hospital and other members of plaintiff GNYHA) after October 1, 1992, the effective date (for New York State) of the Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991, P.L. 102-234 ("1991 Amendments"), codified at 42 U.S.C. § 1396b(w), and the pertinent regulations thereunder, 42 C.F.R. § 433.50-74.

19. Under the 1991 Amendments, a finding by HCFA that a State's taxes were impermissible effects a disallowance of the State's Medicaid expenditures based on such taxes for a period of time during which the impermissible taxes were in effect, and, consequently, entails disallowance and recoupment of FFP that was already paid and that was associated with such expenditures.

20. On December 19, 1994 HCFA notified New York State that 19 identified tax programs did not meet the requirements of, *inter alia*, the 1991 Amendments and that, in accordance with the Amendments, the State should explain how each tax or other revenue source met those requirements, why the requirements were not applicable, or request waiver of the requirements for the particular tax or revenue source at issue.

21. At that time HCFA estimated the amount of FFP for New York State potentially subject to recoupment at $955 million. Since December 19, 1994 New York State has submitted over 60 waiver applications, which to date have not been approved, with respect to the taxes at issue or continuations of the same or related tax programs. Although HCFA has

not provided an updated estimate, the amount of FFP for New York State potentially subject to recoupment has increased substantially since December 19, 1994 and is now estimated to be $2.6 billion.

22. That potential recoupment stems, in part, from HCFA's determination that certain taxes that have been imposed on hospitals and nursing homes, including plaintiffs NYCHHC and Jamaica Hospital and members of plaintiff GNYHA, as well as other health care providers, do not meet the 1991 Amendments' "uniform" criterion. The potential recoupment also stems, in part, from HCFA's determination that certain taxes that have been imposed on hospitals and nursing homes but from which Jamaica Hospital and certain other members of plaintiff GNYHA, as well as certain other health care providers, are exempt do not meet the 1991 Amendments' "broad-based" criterion. Wavier applications were submitted to HCFA to explain how those tax programs further the purposes of the Medicaid program and the 1991 Amendments despite their exclusion of certain provider revenues and types of providers.

23. On October 9, 1997 HCFA announced the correction of an error in its regulations. That correction could reduce somewhat the potential FFP recoupment liability at issue in some of New York State's pending waiver applications. At the same time, HCFA indicated that the majority of taxes at issue would continue to be disapproved absent new federal legislation or a curative and retroactive change in New York State's tax provisions.

24. The New York State Public Health Law provides that, in the event HCFA finds that New York's taxes on hospitals and nursing homes are impermissible, the taxes are modified retroactive to their effec-

tive dates and will be imposed upon previously excluded sources of revenue and classes of providers, as required by HCFA, and that the State Commissioner of Health shall collect those amounts due with interest and penalties if payment is not made within 90 days of notification of liability. Provisions specifying how HCFA's disallowances are to be collected from individual health care providers are set forth in detail in, *e.g.*, N.Y. Pub. Health Law §§ 2807-c(18)(b), 18(d), 18(e); 2807-d(1)(b), (3), (12); 2807-j(3), 2807-j(11); 2807-j(12); 28-7-k(15); 2807-l(3); 2807-s(3), 2807-s(8); 2807-s(9).

25. Plaintiffs NYCHHC and Jamaica Hospital, and other members of plaintiff GNYHA, will suffer harm from the automatic imposition of these increased assessments and liabilities that result from a finding that the State's taxes are impermissible. For example, NYCHHC and other GNYHA member hospitals receive distributions, from, *inter alia*, a bad debt and charity care regional pool (section 2807-c(16)), and NYCHCC and several GNYHA member hospitals have benefited from, *inter alia*, the State's supplementary low income patient adjustment (section 2807-c(14-d)), sources which, under State law (section 2807-c(18)(d)), have been treated as excluded from NYCHHC's and other GNYHA member hospitals' gross revenue tax liability. However, upon a finding by HCFA that such exclusions are impermissible, the exclusions will immediately become null and void and NYCHHC and other GNYHA member hospitals will thereafter be subject to outstanding gross revenue tax liabilities on the previously excluded revenue. Section 2807-C(18)(e). The resulting increase in these plaintiffs' tax liability will be millions of dollars and, in the case of NYCHHC alone, will be more than

$4 million for each year at issue. Plaintiff Jamaica Hospital, by virtue of its designation under New York State law as a financially distressed hospital (section 2807-c(19)(c)), has benefitted, for example, from being exempted from paying the gross revenue and bad debt and charity care and capital statewide pool taxes on any of its revenues. Section 2807-c(18)(b), 2807-d(l)(b). Upon a finding by HCFA that the exclusion of financially distressed hospitals from taxation is impermissible, the exclusions will immediately become null and void and Jamaica Hospital will be subject to the gross revenue and statewide bad debt and charity care pool taxes retroactive to 1992, section 2807-c(18)(e), 2807-d(12), resulting in a tax liability to it of millions of dollars.

26. Section 4722(c) of the Budget Act (i) resolved the controversy arising out of HCFA's 1994 announcement that it deemed impermissible the subject tax programs and HCFA's subsequent failure to approve the waiver applications submitted as a consequence of its announcement, and (ii) relieved the hospital plaintiffs of the costs following from a disallowance by HCFA of the disputed expenditures.

27. The effect of the cancellation of Section 4722(c) on plaintiffs NYCHHC and Jamaica Hospital, and on other members of plaintiff GNYHA, is to reinstate their exposure to the increased assessments and liabilities described above and, as a consequence thereof, to burden such facilities' present abilities to engage in meaningful financial planning and borrowing of funds for operating and other projects.

28. The adverse impact of the cancellation of Section 4722(c) on plaintiffs NYCHHC and Jamaica Hospital, and on other members of plaintiff GNYHA, will result in diminished employment benefits and oppor-

tunities for their employees, including members of plaintiffs District Council 37 and Local 1199. The adverse impact on plaintiffs NYCHHC and Jamaica Hospital, and other members of plaintiff GNYHA located within the City of New York, will result in a diminution of the health and well-being of the City's residents and diversion of City resources to compensate for recouped funds.

Claim for Relief

29. Whether the Line Item Veto Act is viewed as granting the President a unilateral power of line-item revision of bills that have been presented for his signature, or as granting him a unilateral power to repeal portions of duly enacted laws, the Act grants powers to the President that contravene the constitutional process for making federal law.

30. Article I of the Constitution provides a single procedure for making or changing federal law. It vests all federal legislative powers in a Congress comprised of two Houses. It requires that any bill must pass by majority vote in both the House and the Senate before it may become a law. The Presentment Clause then requires that a bill, before it becomes a law, shall be presented to the President, and it gives the President only three choices with respect to a bill presented to him: to "approve" the whole bill and sign it; to "return" (*i.e.*, veto) the whole bill; or to allow the whole bill to become law without his signature. The requirement of bicameral passage and presentment to the President applies to the repeal, as well as enactment or amendment of provisions of law.

31. The Line Item Veto Act violates Article I of the United States Constitution both by impermissibly expanding the powers of the President and by

infringing the requirements of bicameral passage and presentment.

32. The effect of the President's exercise of his purported authority under the Line Item Veto Act to cancel Section 4722(c) of the Budget Act is to cause plaintiffs serious concrete fiscal injury by exposing them to the consequences of HCFA recoupment of contested FFP.

Prayer for Relief

Wherefore, plaintiffs pray:

1. For a declaratory judgment that the Act is unconstitutional, that Cancellation No. 97-3 is invalid, and Section 4722(c) is valid and subsisting law.

2. For reimbursement of their costs in this action, and for such other relief as the Court may deem appropriate.

Respectfully submitted.

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Dated: Washington, D.C.
October 16, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 97-2393 (TFH)

THE CITY OF NEW YORK, ET AL.
PLAINTIFFS

v.

WILLIAM J. CLINTON, ET AL.,
DEFENDANTS

Civ. No. 97-2399 (TFH)

NATIONAL TREASURY EMPLOYEES
UNION ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA,
DEFENDANT

Civ. No. 97-2463 (TFH)

SNAKE RIVER POTATO GROWERS,
INC., ET AL., PLAINTIFFS

v.

ROBERT E. RUBIN,
DEFENDANT

DECLARATION OF CHARLENE BROWN

I, CHARLENE BROWN, hereby declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Director of the Policy Coordination and Planning Group of the Center for Medicaid and State Operations in the Health Care Financing Administration ("HCFA") of the Department of Health and Human Services ("HHS"). I have been the Director of the Policy Coordination and Planning Group since July 7, 1997. The statements made herein are based on my personal knowledge and on information obtained in my capacity as Director of the Policy Coordination and Planning Group. This declaration is submitted in support of Defendants' Motion to Dismiss.

2. HCFA is the agency within HHS that is responsible for the administration of the Medicare and Medicaid programs. Prior to the establishment of the HCFA in 1977, the programs were administered by the Bureau of Health Insurance.

3. The Medicaid program is a joint federal-state program, jointly financed by the federal and state governments and administered by the states, which allows participating states to assist individuals who cannot afford necessary medical care. 42 C.F.R. § 430.0. The federal government provides its contribution by paying each state matching funds, known as federal financial participation ("FFP"), which are based on the state's medical assistance expenditures as calculated under a prescribed formula. Social Security Act, § 1905(b), 42 U.S.C. § 1396d(b). Generally, 50 percent of all state expenditures necessary "for the proper and efficient administration of the state plan" for medical assistance are reimbursed by HHS, 42 U.S.C. § 1396b(a)(7), although the rate of FFP may

vary for particular costs. *See, e.g., id.* § 1396b(a)(3). Payments for health care services are made directly by the state to the individuals or entities that furnish the services. 42 C.F.R. § 430.0. No FFP or other federal funds are paid directly to local government entities or health care providers under the Medicaid program.

4. Under the Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991, Pub. L. 102-234, 105 Stat. 1793, and the regulations promulgated thereunder, 42 C.F.R. Part 433, Subpart B, a state's medical assistance expenditures, used to calculate its FFP, will be reduced by the revenues the state receives from health care related taxes unless the taxes meet certain statutory and regulatory criteria. *See* 42 U.S.C. § 1396b(w); 42 C.F.R. § 433.57. In order for a health care related tax to be permissible—i.e., one which will not result in reduction of the state's medical assistance expenditures—it must (1) be assessed on a permissible class of items or services, as defined by statute and/or regulation; (2) be broad-based, in that it applies to all providers within a permissible class of items or services; (3) be uniform, in that the same rate applies to all providers within a permissible class of items or services; and (4) not contain a hold harmless provision which provides for repayment of part or all of the tax to the taxed providers. 42 C.F.R. § 433.68. If a health care related tax does not meet the broad-based and uniform criteria, a state may submit a waiver application to the Secretary requesting that the tax be treated as a permissible health care related tax, if the tax is, *inter alia*, generally redistributive. 42 U.S.C. § 1396b(w)(3)(E). The requirement that the tax be assessed on a permissible class of items or services cannot be

waived; however, a state may request that additional classes of items or services be added to those provided by statute and regulation. *See* 58 Fed. Reg. 43155, 43169 (Aug. 13, 1993).

5. On December 19, 1994, HCFA sent out two notices to states regarding the states' health care related taxes. The first notice informed the states that certain of their health care related taxes required a waiver of the broad-based and uniform criteria, and invited the states to submit requests for waivers. The second notice informed the states that certain of their health care related taxes appeared to be impermissible because they did not satisfy the criteria requiring that taxes be assessed on a permissible class of items or services, or that the taxes not contain hold harmless provisions. Neither notice served as a final agency decision that any health care related tax required a reduction in a state's medical assistance expenditures, and therefore its amount of FFP, under 42 U.S.C. § 1396b(w). The State of New York received both notices.

6. In order to obtain a waiver of the broad-based and/or uniform requirements, a state must submit a waiver request to HCFA. 42 C.F.R. §§ 433.68, 433.72. After receiving a waiver request, HCFA reviews the waiver request to determine whether a waiver of the broad-based and/or uniform requirements should be granted. Neither the statute nor the regulations require that HCFA make a determination within a definite time period. As of the present date, HCFA has granted waivers of the broad-based and uniform requirements to some states, and has yet to deny any request for a waiver of the broad-based and/or uniform requirements for the State of New York. If HCFA eventually denies a waiver request, future quarterly

medical expenditure reports would be reduced by the total amount of the impermissible tax revenue collected by the state. The state would have the opportunity to appeal the decision to HHS' Departmental Appeals Board. *See* 42 C.F.R. § 430.42.

7. The State of New York has submitted requests for waiver of the broad-based and/or uniform requirements for several health care related taxes imposed by the State. HCFA has made no formal decision regarding New York's requests for waivers. Pending determination of New York's requests for waivers, its medical assistance expenditures calculations have not been affected in any way by the health care related taxes for which waiver requests have been submitted and its FFP has not been reduced.

8. The State of New York also has petitioned for the inclusion of certain additional classes of items or services beyond those currently permitted by statute and regulation as eligible subjects for permissible health care related taxes. As noted in paragraph 4 above, the preamble to the implementing regulation identified the criteria a State's tax program must meet in order for the Secretary to consider adding permissible classes of health care items or services. *See* 58 Fed. Reg. 43155, 43169 (Aug. 13, 1993). However, even if the classes of items or services at issue in New York's petition were added to the permissible list of classes of items or services, in some cases the taxes in question still would not satisfy the broad-based and uniform criteria. Thus, the State also submitted requests for waiver of the broad-based and uniform requirements as to those taxes.

9. Section 4722(c) of the Balanced Budget Act of 1997, provided that all health care related taxes for which the State of New York had applied for a waiver,

were deemed permissible health care related taxes and in compliance with the broad-based and uniform requirements.

10. On August 11, 1997, the President exercised his authority under the Line Item Veto Act to cancel section 4722(c). The cancellation of section 4722(c) has not resulted in a reduction of the payment of FFP to the State of New York with respect to the health care related taxes for which the State has submitted waiver requests. In other words, as of the present date, the State of New York has received exactly the same amount of FFP it would have received if section 4722(c) had not been canceled and were currently in effect. The cancellation of section 4722(c) has not affected the State of New York's requests for waivers of the broad-based and uniform criteria with respect to the taxes at issue; those requests are still pending before HCFA.

Executed on November 12, 1997

/s/ CHARLENE BROWN
CHARLENE BROWN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 97-2393 (TFH)

THE CITY OF NEW YORK, ET AL.
PLAINTIFFS

v.

WILLIAM J. CLINTON, ET AL.,
DEFENDANTS

Civ. No. 97-2339 (TFH)

NATIONAL TREASURY EMPLOYEES
UNION ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA,
DEFENDANT

Civ. No. 97-2463 (TFH)

SNAKE RIVER POTATO GROWERS,
INC., ET AL., PLAINTIFFS

v.

ROBERT E. RUBIN,
DEFENDANT

I, Patricia J. Wang, hereby declare as follows:

1. I am the Senior Vice President of Health Finance and Managed Care for Plaintiff Greater New York Hospital Association (GNYHA), a membership organization consisting of approximately 175 public and voluntary, not-for-profit hospitals and long term care facilities in the greater New York metropolitan area. GNYHA performs policy and quantitative analyses and engages in advocacy on behalf of its membership at the local, State and Federal levels, particularly in the areas of Medicaid and Medicare payment policy. With respect to Defendants' challenged cancellation of section 4722(c) of the Balanced Budget Act of 1997 ("BBA"), Pub. L. No. 105-33, 111 Stat. 251, GNYHA has been working with State and Federal Congressional staff to analyze and try to help ameliorate the harm to Plaintiffs and the State of New York imposed by the cancellation, including joint strategy planning, participation at the State's request in briefings of the New York Congressional delegation and others, review of the specifics of the State and Federal governments' positions, and assessment of alternatives. This Declaration is made in support of Plaintiffs' Opposition to Defendants' Motion to Dismiss.

2. Plaintiff New York City Health and Hospitals Corporation ("NYCHHC"), which operates the municipal hospital system of the City of New York, is a member of GNYHA. Each year, its 11 acute care hospitals provide about 1.5 million days of inpatient care and 5 million outpatient and emergency room visits to primarily low income and Medicaid patients. In 1995, about 60% of its inpatient days were provided to Medicaid patients. NYCHHC serves as the principal provider of essential health care services to low income patients in New York City.

3. Plaintiff Jamaica Hospital Center ("Jamaica") is also a member of GNYHA. It is a voluntary, not-for-profit, 365-bed hospital located in Jamaica, Queens. It provides about 120,000 inpatient days and more than 240,000 outpatient and emergency room visits per year to a predominantly low-income patient population in Queens and Brooklyn; thus, in 1995, over 40% of inpatient days and 52% of discharges were supplied to Medicaid patients. From the mid-1980's through the end of 1996, when authorizing legislation expired, Jamaica was designated as a "financially distressed hospital" pursuant to the New York State Public Health Law. This designation means that State Commissioner of Health found that (1) there was a demonstrated public need for Jamaica's services at its current site and (2) the hospital was experiencing severe financial distress as a direct result of losses incurred from the provision of uncompensated and charity care. *See* N.Y.C.R.R. section 86-1.36; New York Public Health Law section 2807-c(19)(c). As a financially distressed hospital, Jamaica is a crucial part of the voluntary, not-for-profit hospital network for low income and Medicaid patients.

4. New York State ("New York" or the "State") imposes a number of taxes on hospitals and other providers such as nursing homes, health maintenance organizations, and health clinics. The taxes on hospitals date from the early 1980's, and taxes on other types of health care providers have been implemented over time. Revenue from these taxes has supported an array of comprehensive and innovative State health care programs for the poor. These include a program that provides health insurance for uninsured

children; partial compensation to hospitals that provide high volumes of free care to the uninsured; support for primary care physician and other health practioner training; and funding for a comprehensive AIDS Drug Assistance Program that subsidizes or pays for AIDS drugs for those without insurance. It has been imperative for the State to sponsor these local initiatives, particularly in the absence of a national approach assuring health insurance, to meet the needs of its uninsured residents.

5. The Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991 ("Provider Tax Amendments"), Pub. L. No. 102-234, 105 Stat. 1793, 42 U.S.C. 1396b(w), require that a state's taxes be broad based, uniform, applied to permissible classes of health care providers, and lacking in hold harmless provisions. A state is permitted to submit requests to waive certain provisions of the Amendments if its taxes do not meet these statutory criteria. Whether such waivers are granted is governed by the regulations implementing the Provider Tax Amendments at 42 C.F.R. Part 433.50 et seq.

6. By two letters dated December 19, 1994 (Exhibit A hereto), the Health Care Financing Administration ("HCFA"), the Federal agency that oversees the Medicaid program, notified New York that 19 enumerated provider taxes either were not imposed upon permissible classes of providers or did not meet the broad based and uniformity requirements of the statute. The letters asked New York to supply further information as well as waiver requests for the tax programs. HCFA estimated at that time that about $1 billion of Federal Financial Participation ("FFP"), or the Federal share of New York's Medicaid expenditures, was subject to recoupment.

7. Upon information and belief, since January 1995, New York has submitted over 1200 pages of waiver requests representing more than 60 separate submissions for over 20 different provider tax programs. According to paragraph 7 of the Declaration of Charlene Brown submitted in support of Defendants' Motion to Dismiss, HCFA has not made any formal determinations with respect to these applications. Upon information and belief, New York State estimates that the amount of FFP subject to recoupment grew from HCFA's 1994 estimate of $1 billion to about $2.6 billion for the period of time October 1, 1992 through March 31, 1997.

8. New York State law imposes automatic tax liabilities upon hospitals and nursing homes upon a finding that New York's provider taxes are not permissible. *See, e.g.*, New York Public Health Law sections 2807-c(18)(b), (18)(d), (18)(e); 2807-d(1)(b), (3), (12); 2807-j(3), 2807-j(11), 2807-j(12); 2807-k(15); 2807-1(3); 2807-s(3), 2807s(8), 2807-s(9). GNYHA estimates that Plaintiff Jamaica's liability associated with two tax programs alone for which waivers have been filed[1] is about $10 million for the period 1993 through 1996. And, NYCHHC estimates that its retroactive tax liability would be $4 million for each year at issue. Complaint at paragraph 25.

9. Section 4722(c) of the BBA was enacted into law on August 5, 1997, and canceled by President Clinton on August 11, 1997. Section 4722(c) deemed that taxes collected by New York health care providers prior to June 1, 1997, for which a waiver had been applied or would be required, and as to which there had been no

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[1] These are a 1% inpatient revenue tax and a 0.7% gross receipts assessment.

action by defendant Secretary of Health and Human Services ("HHS") as of July 23, 1997, were permissible taxes under the Provider Tax Amendments.

10. Notwithstanding the absence of a formal HCFA ruling on New York's waiver applications, the Congressional Budget Office ("CBO"), which identifies the budgetary impact of Federal legislative proposal, determined that section 4722(c) would cost the Federal government $200 million in Federal Fiscal Year 1998. I am unaware of the particulars of CBO's calculation and why the $200 million figure is less than the $2.6 billion estimate, but I understand that given the uncertainties surrounding estimation of the total liability, CBO adopted a conservative interpretation of the amounts by which Federal outlays would be increased by virtue of the enactment of section 4722(c).

11. President Clinton's message accompanying his cancellation of section 4722(c) (Exhibit B hereto) identified $200 million as the amount by which Federal outlays would be decreased in Federal Fiscal Year 1998 as a result of his action. His message described that section 4722(c) would have given preferential treatment to New York by allowing it "to continue relying upon impermissible provider taxes to finance its Medicaid program," an approach that "would have increased Medicaid costs" and "established a costly precedent for other states to request comparable treatment."

12. At a White House press briefing on August 11, 1997, discussing the President's use of the line item veto (Exhibit C hereto), defendant Franklin Raines announced that HHS would work out an administrative solution with respect to one of New York's waiver requests, but went on to describe section

4722(c) as "a provision that provided special relief to the state of New York for provider taxes that *had been determined by HHS to be illegal* under a 1991 statute." (emphasis added). *Id.* at page 2. He further stated that, as a result of the cancellation, "New York will not be able" to obtain FFP on these taxes. *Ibid.* A clarifying regulation was published on October 15, 1997, 62 Fed. Reg. No. 199, page 53571 (Oct. 15, 1997), which, upon information and belief, makes it possible for one of New York's waivers to be approved, which might reduce the State's $2.6 billion FFP liability by about $700 million.

13. This regulatory change and unrelated policy clarifications were announced in a letter dated October 9, 1997, from Sally Richardson, Director of HCFA's Center for Medicaid and State Operations to all states, including New York (Exhibit D hereto). Otherwise, the letter states that HHS will work with states in trying to obtain *new* Federal legislation that grants HHS greater authority to resolve their outstanding tax issues. Ms. Richardson warned that if such legislation were not obtained by August 1998, the Secretary would "apply with full force the current law." Exhibit D at page 3.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 25, 1997

/s/ PATRICIA J. WANG
PATRICIA J. WANG

[seal omitted]

DEPARTMENT OF HEALTH & HUMAN SERVICES

Refer to

Region II
Federal Building
26 Federal Plaza
New York, NY 10278

December 19, 1994

Mr. Michael J. Dowling
Commissioner
New York State Department of Social Services
Ten Eyck Office Building
40 North Pearl Street
Albany, New York 12243-0001

Dear Mr. Dowling:

On August 13, 1993, HCFA published in the *Federal Register* a final rule implementing Public Law 102-234, "The Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991".

This law amended provisions of Title XIX of the Social Security Act and established new limitations on Federal financial participation (FFP) when States receive funds donated by providers and revenues generated by certain health care related taxes.

The law also established a definition of the types of health care related tax revenues States are permitted

to receive, without a reduction in FFP. Such taxes are broad based taxes which apply to all health care providers in a given class in a uniform manner and which do not hold taxpayers harmless for their tax costs. Consequently, to the extent a State adopts a health care related tax program that otherwise meets the statutory provisions, the States will have acted within the limits of the law.

HCFA is aware that the State of New York imposed the following health care-related tax programs:

1. Effective January 1, 1991, a .6 percent gross receipts tax on personal care services, mental retardation day treatment services and mental retardation specialty hospital services;

2. Effective April 1, 1992, a 2.4 percent gross receipts tax on mental retardation day treatment services and mental retardation specialty hospital services;

3. Effective April 1, 1994, a gross receipts tax on laboratories within hospitals; and

4. Effective August 1, 1992, a .3 percent gross revenue tax on long-term home health care programs.

From October 1, 1992 through September 30, 1993, the taxes have generated estimated revenue of $26,275,000. This results in $13,137,500 of FFP. This information was obtained through estimates by our office. Since the revenue associated with these tax programs has not been reported on the form

HCFA-64.11A, provide HCFA with the tax revenue associated with the classes listed above for the period October 1, 1993, through June 30, 1994.

Section 1903(w)(7) of the Social Security Act specifies nine classes of permissible health care services and providers. Section 42 CFR 433.56 of the implementing Federal regulation established ten additional health care-related classes.

The classes of assessed services mentioned above violate section 1903(w)(7) of the Social Security Act and section 42 CFR 433.56 of the implementing Federal regulation.

Before HCFA takes a disallowance associated with the impermissible classes, we request that you provide any information you may have to support the permissibility of the classes. Should you wish to submit a written response to me, please do so within 30 days from your receipt of this letter. Your timely response will be considered and incorporated in the final action. In addition, since these amounts are estimates, we will send financial reviewers, during the first calendar quarter of 1995, on site to audit State records to determine the specific amounts of the disallowance.

If you have any questions, please contact Arthur O'Leary, Associate Regional Administrator for Medicaid, at (212) 264-2511.

Sincerely,

/s/ WILLIAM TOBY, JR.

WILLIAM TOBY, JR.
Regional Administrator

[seal omitted]

DEPARTMENT OF HEALTH & HUMAN SERVICES
Health Care Financing Administration

Refer to

Region II
Federal Building
26 Federal Plaza
New York, NY 10278

December 19, 1994

Mr. Michael J. Dowling
Commissioner
New York State Department of Social Services
Ten Eyck Office Building
40 North Pearl Street
Albany, New York 12243-0001

Dear Mr. Dowling:

On August 13, 1993, HCFA published in the *Federal Register* a final rule implementing Public Law 102-234, "The Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991".

This law amended provisions of Title XIX of the Social Security Act and established new limitations on Federal financial participation (FFP) when States receive funds donated by providers and revenues generated by certain health care related taxes.

The law also established a definition of the types of health care related tax revenues States are permitted to receive, without a reduction in FFP. Such taxes are broad based taxes which apply to all health care providers in a given class in a uniform manner and which do not hold taxpayers harmless for their tax costs. Consequently, to the extent a State adopts a health care related tax program that otherwise meets the statutory provisions, the States will have acted within the limits of the law.

HCFA is aware that the State of New York imposes the following taxes:

1. A general hospital tax, effective 1/1/91 through 12/31/93, which averaged 5.48% Statewide on hospital rates for all non-Medicare and non-Medicaid payers,

2. A general hospital tax, effective 1/1/91 through 12/31/93, applied at a rate of .23% on hospital rates for all non-Medicare and non-Medicaid payers,

3. A general hospital tax, effective 1/1/91 through 12/13/93, applied at a rate of .235% on hospital rates for all non-Medicare and non-Medicaid payers,

4. A general hospital tax, effective 1/1/91 through 12/31/93, applied at a rate of .1% of gross receipts from all patient care services,

5. A patient care services tax, effective 1/1/91 through 3/31/94, applied at a rate of .6% on gross

receipts from all patient care services. This tax is imposed on the following entities: general hospitals, residential health care facilities (NF), diagnostic and treatment centers, certified home health agencies, long-term home health care programs, personal care providers, ICFs/MR, mental retardation day treatment providers, mental retardation specialty and residential treatment facilities for children,

6. A residential health care facility (NF) tax, effective 4/1/92 through 3/31/94 applied at a rate of 1.2% of gross receipts.

7. An ICF/MR tax, effective 4/1/92 through 3/31/93, applied at a rate of 2.4% of gross receipts. The tax is also imposed on mental retardation day treatment centers and mental retardation specialty hospitals.

8. An HMO tax, effective 7/1/92 through 12/31/92, applied at a rate up to 9% of inpatient hospital reimbursement rates for HMOs,

9. A commercial insurance tax, effective 4/1/92 through 3/31/93, applied at a rate of 11% on inpatient reimbursement rates for commercial insured,

10. A charge/fee of $.50 per triplicate prescription form, effective 4/1/76. This form is used by certain providers dispensing certain controlled substances.

11. A narcotics dispensing fee, effective 4/1/89, applied at a rate from $50 to $600 charged against dispensers of controlled substances, including general hospitals and nursing homes,

12. An application fee of $1,000 for CON submission, plus an additional fee of .4% of project costs for projects going before the State Hospital Review and Planning Council, effective 4/1/89,

13. A mortgage development fee of .9%, and a mortgage operational fee of .2% of the mortgage loan amount charged against eligible hospital and nursing home borrowers, effective 5/19/72,

14. A Statewide Planning and Research Cooperative System (SPARCS) fee, which is a flat fee established annually by the State, and is charged uniformly to all general hospitals, effective 1/1/86. There is a maximum cap of .1% of total costs.

15. A mortgage closing fee and mortgage refinancing fee of .9% of mortgage closing and .5% of mortgage refinancing, of both Federally aided mortgage loans and loans through the New York State Dormitory Authority, applied to health care facilities, effective, 4/1/89.

Section 1903(w)(3)(B) of the Social Security Act specifies that the term broad based health care-related tax means a health care-related tax which is imposed with respect to a class of health care items or services or with respect to providers of such items or services and which, is imposed at least with respect to

all items or services in the class furnished by all non-Federal, nonpublic providers in the State (or, in the case of a tax imposed by a local unit of government, the area over which the unit has jurisdiction) or is imposed with respect to all non-Federal, nonpublic providers in the class and is imposed in a uniform manner.

Section 1903(w)(3)(C) of the Social Security Act and 42 CFR 433.68(d) specify that a tax is considered to be imposed uniformly, if in the case of a tax consisting of a licensing fee or similar tax on a class of health care items or services (or providers of such items or services), the amount of the tax imposed is the same for every provider providing items or services within the class; if in the case of a tax consisting of a licensing fee or similar tax on a class of health care items or services (or providers of such items or services) on the basis of the number of beds (licensed or otherwise) of the provider, the amount of the tax imposed is the same for each provider of such items or services within the class; if in the case of a tax based on revenues or receipts with respect to a class of items or services (or providers of items or services) the tax is imposed at a uniform rate for all items and services (or providers of such items and services) in the class on all the gross revenues or receipts, or net operating revenues relating to the provision of all such items or services (or all such providers) in the State; or in the case of any other tax, the State establishes to the satisfaction of the Secretary that the tax is imposed uniformly.

The taxes mentioned above do not meet the broad based and/or uniformity requirements contained in

section 1903(w)(3)(B) and (C) of the Social Security Act.

Therefore, in accordance with section 1903(w)(3)(E) of the Social Security Act and 42 CFR 433.72, please submit to HCFA, a request for approval of a waiver of the broad based and/or uniformity requirements for each of these tax programs. We request that you submit the request for waiver of the broad based and/or uniformity requirements for each of these tax programs within 30 days from your receipt of this letter. A letter, dated November 16, 1993, from the Medicaid Bureau Director to you outlined the procedure for requesting a waiver of these requirements.

If you have any questions, please contact Arthur O'Leary, Associate Regional Administrator for Medicaid at (212) 264-2511.

Sincerely,

/s/ WILLIAM TOBY, JR.

WILLIAM TOBY, JR.
Regional Administrator

MEDICAID TAX AND DONATION FACT SHEET

As States began exploring new sources of funding for their share of Medicaid expenditures, they began using donations and taxes from health care providers to draw greater Federal matching payments. As the use of these programs increased, the Federal Government's concern grew because States were able to adjust Medicaid payment rates to compensate providers for the cost of the donations or taxes.

On December 12, 1991, Public Law 102-234, "The Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991" was signed into law.

Beginning January 1, 1992, this new law specifies that donations made by providers that are not bona fide and provider taxes that are not broad based, not uniform or that contain a hold harmless provision would result in a reduction in Federal matching payments.

On November 24, 1992, the Health Care Financing Administration (HCFA) published an Interim Final Rule in the *Federal Register*.

This interim final rule was revised based on comments received during the interim final rule comment period and consultation with States, as required by the law. On August 13, 1993, the Final Rule was published in the *Federal Register*.

Beginning October 1, 1993, the first quarter of the Federal fiscal year, States were required to report the tax and donation program revenue to HCFA on

the HCFA Form 64.11. This report is submitted quarterly.

State Medicaid Directors were reminded about the reporting requirements and informed of procedures for making application for certain waivers allowed under the regulation in a letter dated November 16, 1993.

To date, HCFA has identified 9 states which have implemented tax programs that appear to clearly violate the statutory provisions. These programs have projected estimated disallowances, through December 31, 1994, totalling $449,981,182.

In addition, we have identified 23 states (including seven of the nine above) which have implemented tax programs that are either not broad based or uniform. Seven states have submitted waiver requests to HCFA. These tax programs require the approval by HCFA of an application for a waiver of the statutory requirements. The permissibility of these taxes cannot be determined until the waivers are reviewed by HCFA.

To date, HCFA has received waiver requests from 11 States. In addition to the seven states which have waivers requests in process, 3 states have approved waivers and 1 state has a disapproved waiver request.

The states that have not already submitted a waiver request are receiving letters from the Regional Offices which request that they submit waiver applications for approval by HCFA of these tax programs.

For the tax programs that appear to violate the statute, we have requested that States submit within 30 days information to support the permissibility of the tax. In addition, HCFA will work with the States to determine the specific amounts of the disallowances.

For the tax programs that need the approval of a waiver, we have requested that the States submit the waivers within 30 days from receipt of the letter.

EXHIBIT 1

ESTIMATED DISALLOWANCE WITHOUT FURTHER ACTIVITY AS OF 6/30/94

STATE	DISALLOWANCE	% OF STATES' TOTAL MEDICAID EXPENDITURES
1. ALABAMA	UNKNOWN	UNKNOWN
2. ARKANSAS	$ 11,155,233	1.0
3. HAWAII	$ 11,004,974	2.1
4. ILLINOIS	$111,820,000	1.9
5. LOUISIANA	$112,475,280	2.7
6. MAINE	$ 6,500,000	0.6
7. NEVADA	$ 547,101	0.1
8. NEW YORK	$ 13,137,500	0.1
9. TENNESSEE	$120,714,142	3.4

TOTAL ESTIMATED AMOUNT OF DISALLOWANCE FROM END OF TRANSITION TO THE PERIOD ENDING 6/30/94= **$387,344,230**

PROJECTED AMOUNT OF DISALLOWANCE THROUGH 12/31/94= **$449,981,182**

EXHIBIT 2

PROJECTED ESTIMATED FFP THROUGH JUNE 30, 1994 ASSOCIATED WITH STATES WHICH REQUIRE WAIVERS, BUT HAVE NO REQUEST PENDING

1.	ALABAMA	$ 12,052,492
2.	DISTRICT OF COLUMBIA	$ 6,130,000
3.	HAWAII	$ 6,773,858
4.	ILLINOIS	$ 282,376,021
5.	INDIANA	$ 21,755,000
6.	KENTUCKY	$ 62,750,051
7.	LOUISIANA	$ 54,687,214
8.	MINNESOTA	$ 96,956,643
9.	MISSISSIPPI	$ 9,156,214
10.	MONTANA	$ 10,843,612
11.	NEW YORK	$955,375,500
12.	OHIO	UNKNOWN
13.	SOUTH CAROLINA	$ 20,131,266
14.	TENNESSEE	$ 380,950,000
15.	VERMONT	$ 4,249,920
16.	WISCONSIN	$ 22,535,581

EXHIBIT 3

PROJECTED ESTIMATED FFP THROUGH JUNE 30, 1994 ASSOCIATED WITH STATES WHICH REQUIRE WAIVERS, AND THOSE WAIVERS REQUESTS ARE UNDER CONSTRUCTION

1.	CONNECTICUT	$ 308,369,103
2.	FLORIDA	$ 95,840,777
3.	MASSACHUSETTS	$ 205,169,451
4.	MISSOURI	$ 392,233,074
5.	NEVADA	$ 12,093,879
6.	NEW HAMPSHIRE	$ 20,752,981
7.	UTAH	$ 2,800,000

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release August 11, 1997

PRESS BRIEFING BY
TREASURY SECRETARY BOB RUBIN,
OMB DIRECTOR FRANK RAINES,
DIRECTOR, NATIONAL ECONOMIC COUNCIL
GENE SPERLING

The Briefing Room

1:20 P.M. EDT

MR. BOWLES: Good afternoon. Let me talk to you first about some of the process matters that we went through in order to get here because I know a number of you have questions on that because we have had a lot of telephone calls over the last couple of days.

The budget team, which is behind me here, began working on this last Tuesday as soon as we received the list from the Joint Tax Committee. The entire budget team has been fully involved in this effort. We did receive input from numerous outside sources, as you can well imagine, and we began meeting with the President on Friday. We met a number of times on Friday; we met Saturday, Sunday, and again this morning.

I should point out that during the early drafts of the bipartisan balanced budget agreement there were any number of special interest provisions that were eliminated prior to the final draft going into place. Some of those that survived—of those that survived, a number of them we proposed and agreed with; some we agreed to allow to go forward as part of a deal. Some were close calls, frankly, for us, but simply didn't rise to the level of fully objectionable, and some we did, in fact, veto, as the President announced earlier.

Secretary Rubin is now going to talk to you about the tax provisions and give you some details on those, and then Director Raines will talk about the spending and then we'll take some questions.

Secretary Rubin.

SECRETARY RUBIN: Thank you, Erskine. Let me very briefly describe the two tax provisions that the President will be canceling. The first has to do with something called Subchapter F corporations and, basically, what this provision was intended to do was to allow investment firms and others that are trading in securities and have foreign subsidiaries to treat the interest and dividends on the stocks that are part of their trading business as the equivalent of active income. So that it would not be—this may be a little—it's perfectly clear? I can get worse, not better. I think I'm just going to do this this way and then you all can ask any question you like.

Basically, the idea was this. Let me try it a little bit differently. Investment companies and brokerage

firms and others who trade securities abroad felt, and I think rightly, that their interest and dividends on the trading security issue should be treated the same way as a profits of a manufacturing company, which meant that those profits should remain abroad and not be taxed in the United States until they were repatriated. Under current law that was not the case. And this Subchapter F provision was intended to accomplish that purpose.

It was a one-year provision and was drafted so broadly that it not only accomplished the intended purpose, but also would have resulted in the possibility of providing what, in effect, would be sheltered treatment for dividend interest that it was not intended to cover. That is to say the dividends and interests on investment securities.

And we served notice that were involved in the drafting as this went along that this was too broad in its drafting and—however, it retained the undue breadth. As a consequence, it was an appropriate candidate and the President, as you know, has cancelled it through the line item veto.

The second one—neither of these is particularly simple, as you can see. The second one was the one the President referred to with respect to farm co-ops, and as he said he is very sympathetic to the idea of what is known as value-added farming; that is to say, putting farmers in the position where through vertical integration they can get the benefits of processing and, therefore, greater price stability, and put themselves on a more secure footing.

What this was intended to do was to, in effect, provide an incentive for accomplishing that purpose. On the other hand, the way in which it was constructed, in our judgment, had two problems: one, it was inefficient. That is to say it would not only help small farmers, but it could also very well result in large processors getting the primary benefit of this or it could help very large co-ops that didn't need this assistance, so it was too broad in its possible effect, and as a result was an inefficient provision. Secondly, the way it was drafted had the possibility of enabling the sellers, the processors who were selling out to the co-ops to not only defer their income but in some cases possibly never to pay tax—or defer income tax rather, but in some cases never to pay tax. And that certainly was not, in our judgment, an appropriate objective.

So what the President said was that he would cancel this provision, but he would ask Secretary Glickman to work with the people who were interested in accomplishing this purpose and try to find a more efficient means of accomplishing the same purpose.

That, in essence, is a very brief, I hope transparent, discussion of the two tax provisions that were involved in the exercise of the line item veto.

Frank.

DIRECTOR RAINES: As you know, these were two bills passed by Congress. One was the Taxpayer Relief Act of 1997, and the Secretary of the Treasury just went over with you the cancellation there. I'm

going to handle the cancellation under the Balanced Budget Act of 1997.

The item that the President has canceled is a provision that provided special relief to the state of New York for provider taxes that had been determined by HHS to be illegal under a 1991 statute. What this would have done would be to permit New York to continue to levy these taxes and to use them to increase their federal match in the Medicaid program. By canceling the provision, New York will not be able to do so.

The 1991 law was intended to stop a practice whereby states had artificially boosted their federal match by having illusory—levying illusory taxes on hospitals and other providers, and then seeking—and treating that as a cost of the hospitals and then seeking federal reimbursement on this higher cost, which meant that they were able to obtain far more federal reimbursement than the actual money spent for health care. New York has three taxes that fall into that category and this provision would have made all three of those permissible, while keeping similar taxes in other states impermissible under the law.

And in canceling this provision, we believe that the President has put all the states on an even basis. And there is one part of the New York circumstance that we believe can be dealt with administratively, which we are going to be working with them to do that on one of the three taxes. And so we think we can deal with that problem. But otherwise, the cancellation simply leaves the state of the law the way it was before Congress acted.

Q Just a quick question, for those of us from New York. Can you just explain what the three taxes are and which one is the one that you can deal with administratively?

DIRECTOR RAINES: Sure. There is one tax that is a regional tax that has a different impact depending on what region of New York you're in. That is the one that we believe we can deal with administratively. There are other taxes that failed to meet the requirement that they be both broad-based and uniform. And then there's taxes that apply to classes of providers that you're not allowed to include in the tax. So they had these three types of taxes that they'd imposed, the first one, the regional taxes, one that we think we can deal with administratively.

Q They are all on providers only?

DIRECTOR RAINES: All of these are on providers. Again, remember, they are not real taxes, they're never collected. It's simply an obligation that they would put on a hospital to pay over money that was given to them by the state. They then come to the federal government and say, look, we now have this big expense, and then they reimburse the hospital for the amount of money that they paid in the tax. So it's simply a way to increase the amount of the claim on the federal Treasury with no practical effect on the hospitals except in some cases they are allowed to keep some of the extra funds.

Q The effect of that, would New York, say, have to repay any money to the federal government because of this?

DIRECTOR RAINES: The effect of this will be that New York will be treated the same as the other states. And HHS is in the process now of resolving with those states how they will be treated with regard to the implications of these taxes in the past.

Q There may have to be a pay-back?

DIRECTOR RAINES: Well, again, that's something that HHS will work out with them, similar to the way they're working it out with the other states.

Q If a tax is never paid why are you going to deal with one portion of it administratively? Could you explain?

DIRECTOR RAINES: If this tax becomes permissible and becomes a real tax, then the state will no longer be simply reimbursing them for a phantom tax and it becomes a legitimate tax under the law, and so that we will no longer have the extent of gaming that we had prior to the 1991 law.

Q Mr. Raines, the President said in the statement that the real relevance of the line item veto will come with the appropriations bills. Suppose his action today does not serve as a deterrent in the cycle of FY'98 appropriations bills that are going to wend their way to the White House, just looking on past appropriations patterns, how much do you think the

line item veto over an annual cycle of appropriations will save the country?

DIRECTOR RAINES: I thinks it's impossible to say. Already I think there are fewer problems in the appropriations bills that have moved so far in Congress, and so we have already seen as a result of the bipartisan spirit a lot of the issues coming off the table. So I think it's impossible to speculate because we've already seen behavioral changes happening, and I don't think I could disaggregate which aspect of it is having which effect.

Q Well, just look at the FY'97 bills that are now law, if the President had had the line item veto, what would be your ballpark guess as to how much he would have stripped out?

DIRECTOR RAINES: It would just be a wild guess. We haven't done that exercise and I really wouldn't want to speculate on something where we haven't done any work.

Q Director Raines, could you estimate the value of the cost to New York of this? Because the figure being bandied about by the administration is $200 million, but there are people in New York saying it's a lot more. And also, you said that it leaves New York in the same situation, but New Yorkers say that New York gets one of the lowest Medicaid reimbursement rates and far lower than, say, a state like Arkansas. Could you address that as well?

DIRECTOR RAINES: Well, the New York reimbursement rate is 50 percent and there are a number

of states that are at 50 percent. It depends on your per capita income and the state, and so there are a number of states at 50 percent. The best estimate we have at the moment is really a CBO estimate where they have estimated the savings by this cancelation at $200 million. We haven't reestimated that provision yet and so I don't have any number other than the 200 that was used by CBO when Congress passed the provision.

Q Director Raines, could you explain who was responsible for inserting this language into the bill in the first place and why?

DIRECTOR RAINES: I don't know who, but I would assume it had something to do with people in New York. (Laughter.) The why I think is that there is—as you may know, over the years there have been constant efforts to utilize the Medicaid program as a way of financing—either increasing state reimbursements or financing other things. And this is an effort to try to stop the implementation of the 1991 law, and I think it probably is a sign that they believe that the law was about to be implemented that they sought protection.

Q Were there discussions with the congressional delegation from New York in the process of reaching the decision to cancel this item?

DIRECTOR RAINES: There were discussions with many people over the last several weeks about this and other provisions.

Q Did you hear a defense from the congressional delegation of this item?

DIRECTOR RAINES: I think we've—I've heard the defense. The defense that I have heard is that the Medicaid program is very expensive and the state would like to see additional reimbursement. And it's a very straightforward position that they would like to have a higher reimbursement and this is a way to do it. Our view is that this is an impermissible way to do it and would distinguish the state from any other state in exactly the same circumstance.

Q You have no idea if this was done at the behest of a Republican senator, Republican governor? You're saying you have no idea if this was inserted by a Republican senator on behalf of a Republican governor?

DIRECTOR RAINES: Well, as I recall, there is bipartisan delegation from the state of New York, and the senior-most member of the delegate I believe is a Democrat. So I don't think the politics of this is going to answer any questions as to where we came out. It really is the policy with regard to this provision, and this is a very consistent position of ours. This is nothing new. We've been taking this position throughout the administration. Everyone knows what our position is. Everyone knows that we found these provisions to be unlawful. We're simply being as consistent as can be. And when we see this provision that is contrary to it, the President decided to cancel the provision.

So the only news here is that the current effort to enforce the law involves cancellation of a provision of law, but we've been administratively implementing the '91 law all along.

Q Do you have any evidence that New York is using the Medicaid money in the way that you've suggested, to finance other projects unrelated to health care?

DIRECTOR RAINES: We have made a determination that they were using the money in a way that was not the way contemplated by the Medicaid law.

Q Can you give us some examples?

DIRECTOR RAINES: Simply that they've been levying these taxes and having the reimbursements and artificially increasing their federal match. So even if the use of it was not for something we would disagree with, the fact of the matter is, the Medicaid program is not there to be a catch-all financial instrument for anything that the state may view as to be a worthy purpose.

Q I'm just anticipating the state's argument here. They're likely to say, this decision is going to reduce the amount of money we can spend for health care for poor people. And that hardly seems the kind of pork that the line item veto is invented to deal with, so why use it on this particular provision?

DIRECTOR RAINES: That's been an argument that's been used over the years. And, in fact, when

you really look to see, did they, in fact, expand the Medicaid program when they put into effect these provisions, did they increase benefits to people, almost invariably the answer is no. So while we're sympathetic to the fiscal concerns of the state, we don't think that they should be resolved through special treatment in the Medicaid program.

Q So you're saying there will be no negative impact on Medicare users from the effects of this veto?

DIRECTOR RAINES: This is a Medicaid program, and we do not expect that the state will change—and we've had no indication from them that they would change the benefits available under the Medicaid program.

Q Can you clarify something that came up in the review of the farm co-op measure, as to whether or not this fellow down in Texas—

SECRETARY RUBIN: Simmons?

Q —yes—as in fact going to be the principal beneficiary of this measure?

SECRETARY RUBIN: I gather there is some question as to how it would have affected him, but let me tell you, in our analysis, that was not what we focused on. We focused on exactly what the President has said, which was, what effect would this have on farmers and on co-ops and on processors. We did not base our decision on Mr. Simmons, so that—

Q The answer to that question, though?

SECRETARY RUBIN: I have seen his argumentation. I've seen argumentation the other way. I truly don't know. I don't know enough about his specific tax situation to know what effect it would have on him, but that was also not the basis on which the decision was made. The basis on which the decision was made was exactly what I explained before and the President in more general teams discussed at his press conference.

Q Would you classify the measures that were the —

Q Can I just follow up on that real quickly and ask about the revenue estimate estimates associated with the food processing provision? The Joint Tax Committee's estimate suggests that as much as perhaps even 80 percent of the 10-year revenue lost to the Treasury from this provision would be associated with just—I just it's actually as much as 60 percent.

SECRETARY RUBIN: Well, they said $84 million, of which 60 was this, I think.

Q Sixty, that's right, would be due solely to this specific transaction.

SECRETARY RUBIN: Correct.

Q Number one, does that look about right to you and to the Office of Tax Analysis? And number two, if it is correct, I mean, doesn't that suggest that there would be hardly any cooperatives actually availing

themselves of this particular provision and it wouldn't really be a major revenue loser?

SECRETARY RUBIN: Clay, we had a slightly higher estimate. I think our estimate was about $98 million, if I remember correctly, or something like that. Theirs, as you said, was 84 million. They said that 60 was Harold—was the Simmons transaction. But the answer is that—

Q Do you have a figure for the Harold Simmons transaction from the Treasury as well?

SECRETARY RUBIN: John, do we? No, we do not. But I think the point remains the same, Clay. The President was sympathetic to the purpose and said that the value-added farming that it was trying to encourage was a good idea. But the problem is the way this was drafted was inefficient and would also result in some people possibly never paying taxes rather than just deferring tax, and that was the basis for cancelation.

Q Would you classify the two items that you described as that somebody intentionally slipped in and it was written that way to have a purpose that you are now trying to avoid, or were these mistakes and flaws?

SECRETARY RUBIN: I'm not going to impute purpose. I'm just describing the analysis. And based on that analysis—

Q Can anybody up there talk about that? Is this pork that was intentionally put in, or are these mistakes?

SECRETARY RUBIN: Others may want to comment differently, but I don't see what you gain by trying to impute purpose. I think the purpose—the question is, analytically, how does this compare to the criteria the President mentioned, and based on those criteria, these seemed appropriate to cancel.

Q Mr. Bowles, it's kind of a follow-up to this earlier question, and I'm a little confused. The President said, anything that he vetoed would have to be things that were not part of the agreement. So my question is, first when did you know that these things were in there? Did you know them—did you know this before the President and the administration agreed to this deal, or was it after? And if you knew it before, how could you risk—if these things are so important, how can you risk that line item veto might be declared unconstitutional and these things would become law? How can you risk that?

MR. BOWLES: Well, let me just state from the viewpoint of those of us who were actively involved in the negotiation, that these items were not discussed at our level. I think there was some discussion among the staffs about some of these items, but at are our level none of these were discussed. Had they been discussed and had we agreed to them, then we would not have exercised the line item veto in this regard.

Q Well, did you know they were in there at the time the administration agreed with Congress to go ahead with this? Or did you find out after the fact?

MR. BOWLES: I was not aware of any of the three of these because none of these three were discussed at our level and that's why we felt it appropriate to use the line item veto in that regard. Some of these were discussed at lower levels. We expressed objections to some of the way they were formatted and the way they were formulated, but they continued to go forward. We did not discuss them at our level.

Q I have to try follow up. I don't think I'm getting an answer to my question. Did you know—by the time the administration agreed with House Republicans, did you know these things were in there or did you become aware of it afterwards?

MR. BOWLES: I think I've tried to answer that question for you. If you look at the document, it's about that thick, okay? And none of these items were discussed at the level that Bob and Frank and I discussed them with the Republicans. However, each of them, I think, probably were discussed at lower levels. We expressed objection to them, and they ended up going into it anyway.

Q Mr. Bowles, some analysts think that one of the real powers of the line item veto doesn't come on budget, tax, and spending issues at all, but on unrelated issues where the President can use the threat of a line item veto to get a recalcitrant member in line on some other issue. Do you think that's true?

MR. BOWLES: Well, the President has said that was his experience in Arkansas with the line item veto, that he only had to actually use it a few times, but having the very threat of it was enough to get some highly objectionable provisions removed before they actually got into the bill.

Q But could it be used to, say, to get Jesse Helms to give William Weld a hearing—(laughter)—by threatening to veto North Carolina pork?

MR. BOWLES: I can't imagine we would threaten to veto anything from North Carolina—(laughter)—but we certainly haven't talked about that yet.

Q A follow-up to that. Was there—

Q —expected legal challenge—first of all, do you feel that since there is a mix now from tax and spending that you're going to be on stronger ground? And second, will one of these affected parties have to bring suit? Is that the way you all anticipate it would work?

MR. BOWLES: I think Frank can probably speak to who actually can bring suits, since he is one of the named people in the original action. But we really looked at each one of these on their own merits and their own merits alone, and not whether one was a tax provision or a spending provision.

DIRECTOR RAINES: The gist on the factual question, what the Supreme Court held in their last decision was it required someone who was actually

affected by the President's action to bring suit. So we don't know that there will be a suit, but anyone who can claim that they were harmed as a result of this would have standing. They would then have to make a case.

Q Could that be New York State, for instance, or would that have to one of the hospitals?

DIRECTOR RAINES: The courts will sort out who, among all the people, would have standing. But, clearly, the President has now acted. He has acted under the very clear advice from the Justice Department that the statute is constitutional. It is our fundamental belief it is a constitutional statute and one that has great history behind it. And we will move forward in the expectation that the statute will be held to be constitutional as we look at other bills that are presented.

Q When did you decide that these would be the three? When was that decision made?

MR. BOWLES: The President made the final decisions this morning.

Q Mr. Raines, if I could follow up on the standing question. The original plaintiffs on the Hill have different opinions as to whether they have standing now that the veto has actually been exercised. Would your legal advisors tell you that a lawmaker would have standing?

DIRECTOR RAINES: I don't know what our legal advisors would say on that. I think you're going to

have to—I think I would direct that really to the Justice Department—

MR. MCCURRY: They advised us not to answer that.

DIRECTOR RAINES: Right—because you're getting into very esoteric aspects of standing law.

Q Back to Medicaid. Mr. Raines, has any other state—this ruling that shut down the pass-through tax and the draw-down—the law applied to all 50 states. Since the implementation of that law, has any other state sought to get out of it in this way?

DIRECTOR RAINES: Not to my knowledge.

Q Is there any connection between the fact that Senator Moynihan was involved in the constitutional challenge and he's from New York State? In your choice. In talking about the deterrent power of the line item veto and his political—

DIRECTOR RAINES: No.

Q Also, Mr. Raines, could you explain why—there were several other geographic Medicaid provisions that were put in this bill, for instance, the Alaska one which raised the reimbursement rate. Why was this one more objectional to the President, let's say, than the Alaska one?

DIRECTOR RAINES: As the President pointed out, this would have put into law a bad policy. It is the use of these taxes to escalate the federal reimburse-

ment is bad policy. Congress has determined that and this would simply grandfathered a state in to continue that bad policy.

Q You also, I think, had sent a letter to the Hill saying that the Alaska provision was unwarranted and bad policy. Do you know why you chose—

DIRECTOR RAINES: No, what we said was that we thought that if you're going to go about changing the federal reimbursement at the state level, that it should be done broadly. And not that there were certain—there weren't states that had a legitimate argument that their rate ought to be a different rate, but we thought that it would be better practice to do it broadly. That doesn't mean if they do it narrowly you would say, well, then let's reject this narrow application of what you may believe to be a good policy.

Q Mr. Bowles, could you characterize the debate that took place within the White House whether to even use this or not? And also, already Mr. Gingrich is saying that this is petty politics. Are you perhaps risking losing the spirit of bipartisanship over what really amounts to three fairly insignificant amounts when you look at the overall budget deal?

MR. BOWLES: I'll answer your questions in order. First of all, we did have a number of discussions within the White House on various provisions—on whether or not they really rose to the level that we wanted to use the line item veto. But we looked at each separate provision based on its own merit.

Secondly, I have had discussions with the Speaker about the use of the line item veto. He was aware that we did plan to use it, and this morning I spoke with him and told him the items on which we did plan to use it. We do—we have accomplished a lot going over the last year with a real bipartisan spirit here, with real cooperation between the White House and the Congress, and we have a very heavy agenda going forward for the fall. And I expect we will continue to see that bipartisan spirit go forward.

Republicans and Democrats, going back over time, have been proponents of the line item veto. It's actually when you have to use it is when you get some disagreement.

Q What did Mr. Gingrich say to you?

MR. BOWLES: When I told him the specific items that we had decided to use, he thanked me for calling him and left it at that.

Q Mr. Bowles, are you going to stay on for this heavy agenda in the fall, or are you leaving?

MR. BOWLES: I'm going to be here until I finish these to-do items that are on this list the President gave me back in November of last year.

Q How long is that?

Q Did Mr. Gingrich—

MR. BOWLES: Basically, I think he was actually on the treadmill when I talked to him.

Thank you.

Q Can you tell us what happens to the money that was saved here? Does it go into a lockbox for deficit reduction or—

DIRECTOR RAINES: Yes.

Q So that money is not segregated and will be spent —cannot be spent—

DIRECTOR RAINES: Cannot be spent, that's right.

Q Mr. Raines, could we get an answer to Allison's question before about Alaska versus New York? Is what you were saying that if the provision had favored —if the bill had used the same mechanism to help New York that was used to help Alaska, that then you would not have objected?

DIRECTOR RAINES: If the—they are two totally different cases. In Alaska's case, there was an effort to change directly the reimbursement rate.

Q If the law included an attempt to raise New York's reimbursement rate directly to capture that same amount of money, would you also have objected?

DIRECTOR RAINES: I don't know. It's not something we looked at. I don't want to speak for what has been a very good group process or speak for the

President on something not presented to him, so it would be just speculating. But I gave you the rationale by which we examined it, and the President did as well, so I think you'll just have to infer from that. But I don't want to jump ahead of my colleagues or the President on what he might have done in another set of circumstances.

Q A quick question for Mr. Rubin and Raines. Were these three provisions on your original Treasury and OMB statements of administration policy of provisions you would recommend a veto over all of the—

DIRECTOR RAINES: We did not make any threats of line item vetos during the process at all.

Q But you had—both of you had lengthy lists of provisions that you objected to.

DIRECTOR RAINES: I believe this item was, in fact, mentioned in one of my letters. The New York provision—on the tax side, we did not get to the level of the size of these kinds of items.

Q Gene, could you take one question, just to repeat Cheryl's question, which I think was legitimate? Are these particular items that were canceled today—do they fit that description of pork, which to most voters the line item veto was designed to remove from the bill? Is this really pork that you're going after today?

MR. SPERLING: I think what Secretary Rubin was saying was that we looked at the item on merit and policy without asking what the motive was. But I

think the important point for the deterrent effect for the future is that whether some of these provisions were purposely crafted to allow for certain abuses, or they were just accidentally drafted that way, the effect either way is that from now on people know that these provisions will get a high level of scrutiny. And already this week, we have seen provisions have to be defended publicly that never before would have had to be scrutinized under the light of day.

So every single item in the future now, everybody is going to know that if they put a provision that is sloppily drafted or drafted to promote a special interest or overly narrow, that they will have to defend it publicly and that it may be subject to a presidential line item veto. And it is that very powerful deterrent effect that will have, I think, the considerable savings, both in terms of money to the taxpayer, but also savings in the sense of having good policy drawn for the public interest as opposed to bad policy that has loopholes and allows for more special interests?

Q Want to bet? (Laughter.)

MR. MCCURRY: Thanks, Gene. Thank you.

END 1:50 P.M. EDT

[seal omitted]

DEPARTMENT OF HEALTH & HUMAN SERVICES
Health Care Financing Administration

Washington D.C. 20201-0001

OCT 9 1997

Dear State Medicaid Director:

We are writing to inform you of several policy interpretations which the Health Care Financing Administration (HCFA) has recently adopted. These interpretations relate to the Medicaid Voluntary Contribution and Provider-Specific Tax Amendments of 1991, Pub. L. No. 102-234 § 2(a) (codified at section 1903(w) of the Social Security Act (the Act)), and related regulations, and were adopted as part of a review of HCFA's policies in the area of provider taxes.

As you know, the Medicaid Voluntary Contribution and Provider Specific Tax Amendments were enacted to limit Federal financial participation (FFP) in States' medical assistance expenditures when the States receive funds from, among other sources, impermissible health care related taxes. Under the Act, States may continue to receive FFP with respect to "broad based" and "uniform" health care related taxes. According to section 1903(w)(3)(B), a broad based health care related tax means a health

care related tax which is imposed with respect to a permissible class of items or services on all providers in that class. In addition, under section 1903(w)(3)(C) of the Act, a uniform health care related tax means a tax which is imposed with respect to a permissible class of items or services at the same rate for all providers. For those taxes which are not broad based or uniform, the Secretary may grant waivers if she finds that the taxes in question are "generally redistributive," pursuant to section 1903(w)(3)(E) of the Act.

In this letter, we first clarify HCFA's interpretation of the requirement that health care related taxes be applied uniformly. Second, we clarify that, when the Secretary has granted a waiver with regard to a health care related tax because she has concluded that the tax is generally redistributive, a later uniform change in the rate of tax will not require the State to submit a new waiver request. Third, we are reminding States of their opportunity to propose additional classes of providers, items, or services which the Secretary may consider including as permissible classes. Fourth, we are reminding States that all provider related donation revenue and health care related tax revenue, which includes licensing fee revenue, must be reported to HCFA on the HCFA-form 64.11A. Lastly, we commit to working with States to consider ways, including legislation, to expedite the identification of impermissible taxes and end their use.

First, with regard to the requirement that health care related taxes be uniformly imposed, the implementing Federal regulation at 42 C.F.R. § 433.68(d)

(iv) specifies that a health care related tax will be considered uniformly imposed if the tax is imposed on items or services on a basis other than those provided by statute, and the State establishes to the satisfaction of the Secretary that the amount of the tax is the same for each provider of such items or services in the class. We are clarifying that HCFA interprets 42 C.F.R. § 433.68(d)(iv) to include health care related taxes on the occupied beds of a facility or the patient days of a facility. HCFA has concluded that, to the extent the rate of a health care related tax is the same for each occupied bed or patient day and the tax is applied to all provided in the permissible class of services, a health care related tax program based on occupied beds or patient days will be considered uniformly applied. Previously, HCFA had interpreted the Act to require that the tax be applied to all beds or all days to be considered uniform.

Second, where States have sought and obtained waivers for existing health care related tax programs, HCFA is clarifying that a uniform change in the rate of tax will not require a new waiver. To the extent a State makes no other revisions to an existing health care-related tax program (e.g., modifications to provider or revenue exclusions), HCFA would not view a uniform change in the tax rate as a new health care related tax program.

Third, section 1903(w)(7)(A)(ix) of the Act states that the Secretary may establish, by regulation, classes of health care items and services, other than those listed by statute. The implementing regulation, at 42 C.F.R. § 433.56 specifies 10 additional permissible classes of items and services. In addition, the

preamble to the implementing regulation indicates that the Secretary will consider adding additional designations and that any proposed class meets the following criteria: 1) the revenue of the class is not predominantly from Medicaid and Medicare (not more than 50 percent from Medicaid and not more than 80 percent from Medicaid, Medicare, and other Federal programs combined); 2) the class is clearly identifiable, for example, by designation through State licensing programs, recognition for Federal statutory purposes, or inclusion as a provider in State plans; and 3) the class is nationally recognized rather than unique to a State. This is a reminder and an invitation to States that they may identify additional classes.

Fourth, section 1903(w)(7)(F) of the Act defines the term "tax" to include any licensing fee, assessment, or other mandatory payment. Therefore, any licensing fee applied to the items or services listed by statute and/or regulation must comply with the law. Furthermore, section 42 C.F.R. 433.56(a)(19) requires that for health care items or services not listed by regulation on which the State has enacted a licensing fee or certification fee, the fee must be broad based, uniform, not contain a hold harmless provision, and the aggregate amount of the fee cannot exceed the State's estimated cost of operating the licensing or certification program. Section 42 C.F.R. 433.68(c)(3) states that waivers from the uniform and broad based requirements will automatically be granted in cases of variations in licensing and certification fees for providers if the amount of such fee is not more than $1,000 annually per provider and the total amount raised by the State from the fees is used

in the administration of the licensing or certification program. This is a reminder to States that any licensing or certification fee imposed on providers of health care items or services is considered a health care related tax.

Furthermore, section 1903(d)(6)(A) of the Act requires that States include in their quarterly expenditure reports, information related to provider-related donations and health care-related taxes. This is a reminder to report all provider-related donation revenue and health care-related tax revenue on the HCFA-form 64.11A.

The Administration remains committed to ending the use of impermissible taxes. Failure to end their use undermines the integrity of the Medicaid program and would be unfair to those States that are in compliance as well as to the taxpayers who pay for the program.

HCFA will continue to apply the current provider tax laws. As a part of this process, HCFA will have discussions with States individually to understand their existing provider taxes and, where necessary, to develop better compliance plans that recognize the challenges that States may face.

The Administration's goal is to end the use of impermissible taxes as soon as possible. To achieve rapid and full State compliance, it is willing to work with States to resolve impermissible tax liabilities. The Administration believes that this will be facilitated by legislation that codifies the tests to determine that a tax is permissible and concentrates in the

Department greater authority to work with States coming into full compliance. In the development of this legislation, the Administration will work with States, the National Governors' Association, and Congress to address the concerns States have raised with respect to current law. If, however, legislation is not enacted by August 1998, the Secretary will move forward to complete the process already begun to apply with full force the current law.

If you have any questions concerning these policy clarifications, please contact your regional office.

Sincerely,

/s/ SALLY K. RICHARDSON

SALLY K. RICHARDSON
Director
Center for Medicaid and State Operations

cc: All Regional Administrators

All HCFA Associate Regional Administrators
Division of Medicaid and State Operations

Lee Partridge
American Public Welfare Association

Joy Wilson
National Conference of State Legislatures

Jennifer Baxendell
National Governors' Association

[seal omitted]

DEPARTMENT OF HEALTH & HUMAN SERVICES
Health Care Financing Administration

Press Office
Washington D.C. 20201-0001

STATEMENT BY SALLY RICHARDSON
DIRECTOR, CENTER FOR MEDICAID AND
STATE OPERATIONS
HEALTH CARE FINANCING ADMINISTRATION

Thursday, October 9, 1997

HCFA Center for Medicaid and State Operations Director Sally Richardson issued the following statement regarding today's policy clarification on state provider taxes used to obtain federal matching funds for Medicaid.

We have a responsibility to make sure that state taxes collected from health care providers and then used to generate federal matching funds for Medicaid are levied in a way that is fair and equitable among all states. Permitting some states to use improper provider taxes to obtain federal funds threatens Medicaid's fiscal integrity and is unfair to states that play by the rules.

We are today clarifying policy on taxes collected from health care providers based on patient days or occupied beds. This action makes clear that certain taxes are acceptable in 10 states that have asked us for waivers. Because of the complexity of the law there are states that have other taxes that still require review.

Given the outstanding questions, we are today announcing our intention to work with Congress and the states to enact legislation that codifies the tests for whether a state provider tax is permissible. This legislation will also enhance the secretary's authority to resolve current liabilities for states that come into full compliance with the law. We sincerely hope such legislation will expeditiously end the use of impermissible taxes. However, if such legislation is not passed by next August, HCFA will apply with full force the current policies.

We realize this is a big undertaking, and stand ready and willing to work with Congress and the states in this effort.

###

FACT SHEET ON MEDICAID HEALTH CARE-RELATED TAXES

October 9, 1997

Medicaid, enacted in 1965, is a Federally-guaranteed health insurance program for certain low-income individuals, primarily pregnant women, children, the elderly and the disabled. It is a state/Federal partnership where the Federal government sets broad eligibility standards and pays states a portion of their Medicaid costs. States must commit funds in order to receive Federal financial participation (FFP). The source of certain State funds has been contentious, as described below.

BACKGROUND

During the late 1980s, many States established new taxes that had the effect of increasing their Federal Medicaid funds without using additional State resources. Typically, States would raise funds from health care providers (through provider taxes or "donations"), then pay back those providers through increased Medicaid payments. Since the Federal government pays at least half of Medicaid payments, the provider taxes or donations would be repaid in large part by Federal matching payments. Using this mechanism, the State realized a net gain because it had to repay only part of the provider tax or donation it originally received.

The widespread use of these financing mechanisms contributed to the extraordinary increases in Federal Medicaid expenditures in the late 1980s and early 1990s. One report found that provider tax revenue

rose from $400 million in 6 states in 1990 to $8.7 billion in 39 States in 1992. There was a similar increase in Federal Medicaid spending, which more than doubled between 1988 and 1992, with an average annual rate of over 20 percent. The number of people served by Medicaid did not rise by nearly so much.

In response to this unprecedented drain on the Federal Treasury, Congress passed "The Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991" (Public Law 102-234). The first stand-alone piece of Medicaid legislation in the program's history, this law permits States to use revenue from health care-related taxes to claim Federal Medicaid matching payments only to the extent that these taxes are broad based (i.e., applied to all providers in a definable group); uniform (i.e., same for all providers within the group); and are not part of a "hold harmless" arrangement (i.e., the taxes are not devised to repay dollar-for-dollar the provider who was initially assessed). The law also precluded States from using provider donations, except in very limited circumstances. In addition, the law introduced limits on how much States could pay hospitals through the disproportionate share hospital (DSH) program—the primary way that States repaid their provider taxes or donations.

The final regulation for this law was published in 1993 after extensive consultation with the States and the National Governors' Association. The regulation defined which taxes are permissible, HCFA's methodology for determining permissibility of taxes, and a process for requesting waiver approval for tax

programs that are either not broad based and/or uniform.

Since the regulation, HCFA has communicated with States—through letters, a national conference, and State contacts at the regional level—about the provider tax policies. However, given the complexity of health care financing, some issues intended to be resolved by the 1991 law, the 1993 regulations, and subsequent HCFA interpretations are still questioned by some States. This has led to a review by HCFA of its interpretations of these policies.

POLICY CLARIFICATIONS

Today, the results of HCFA's review of its interpretation of the provider tax law and regulations is being described in a State Medicaid Directors' letter and a *Federal Register* notice. HCFA has determined that several changes in its implementation of the Medicaid provider tax provisions are appropriate, as described in today's letter to Medicaid Directors (dated October 9, 1997). First, HCFA will clarify its interpretation of taxes that are considered uniform. It will permit taxes on occupied beds or patient days to be considered uniform (previously, only taxes on all beds and all days were considered uniform). Second, the letter states that States do not need to submit a new waiver request for a tax subject to an existing waiver if there is a uniform change in the tax rate. The letter also reminds States that they may suggest additional classes of providers to qualify as "broad based" and that they should submit quarterly reports on their provider taxes and donations. These clarifications have resulted in the determination that

certain taxes in 10 States are permissible and require no further review.

In addition, HCFA will publish in the October 10, 1997 *Federal Register* a correcting amendment to the provider tax regulation regarding its interpretation of the uniformity test. It corrects the threshold for allowable tax programs based on regional variations, enacted and in effect prior to November 24, 1992. The correction is to conform the regulation to HCFA and Congress's intent to recognize such taxes as generally redistributive.

PLANS FOR ENDING THE USE OF IMPERMISSIBLE TAXES

In its effort to apply the law and end the use of impermissible providers taxes, HCFA will open discussions with the States individually to understand better their specific provider taxes and their issues resulting from the current law.

The Administration's goal is to end the use of impermissible taxes as soon as possible. To achieve rapid and full State compliance, it is willing to work with States to resolve impermissible tax liabilities. The Administration believes that this will be facilitated by legislation that codifies the tests to determine that a tax is permissible and concentrates in the Department greater authority to work with States to resolve impermissible tax liabilities in return for States coming into full compliance. In the development of this legislation, the Administration will work with States, the National Governors' Association, and Congress to address the concerns States have raised with respect to current law. If, however,

legislation is not enacted by August 1998, the Secretary will move forward to complete the process already begun to apply with full force the current law.

It is our hope that States will be responsive and cooperative so we can resolve these issues in a mutually satisfactory way.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 97-2393 (TFH)

THE CITY OF NEW YORK, ET AL.,
PLAINTIFFS

v.

WILLIAM J. CLINTON, ET AL.,
DEFENDANTS

Civ. No. 97-2399 (TFH)

NATIONAL TREASURY EMPLOYEES UNION,
ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA,
DEFENDANT

Civ. No. 97-3463 (TFH)

SNAKE RIVER POTATO GROWERS
INC., ET AL., PLAINTIFFS

v.

ROBERT E. RUBIN, DEFENDANT

DECLARATION OF SARAH VAN LEER

I, Sarah van Leer, hereby declare under penalty of perjury as follows:

1. I am a Senior Attorney in the Division of Legal Affairs, Bureau of House Counsel, New York State Department of Health (DOH). This Declaration is based upon personal knowledge and information received in my official capacity and is submitted at Plaintiff's request for the purpose of responding to allegations made in the Declaration of Charlene Brown dated November 12, 1997, as part of Defendants' Motion to Dismiss. In this and my prior role in the Counsel's office in the New York State Department of Social Services, I have worked since late 1992 to ensure that New York State ("New York" or "the State") complies with the Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991 ("Provider Tax Amendments"), Pub. L. 102-234, 105 Stat. 1793, and related regulations. 42 C.F.R. Part 433, Subpart B. My responsibilities have included analysis of Federal Medicaid law and regulations, review of New York's health care provider tax waiver applications, discussions with the U.S. Health Care Financing Administration ("HCFA"), drafting and negotiation of the canceled section 4722(c) of the Balanced Budget Act of 1997, and related matters.

2. New York has imposed a number of taxes, fees and assessments on hospitals and other health care providers such as nursing homes, health maintenance organizations, and health clinics. The tax on hospitals dates since the early 1980's. Taxes on other types of health care providers have been implemented over time up through the present. Revenue from these health care provider taxes and assessments has supported an array of State health care programs for the poor. These include a program that provides health insurance for uninsured children; partial

compensation to hospitals that provide high volumes of free care to the uninsured; support for primary care physician and other health practitioner training; funding for a comprehensive AIDS Drug Assistance Program that subsidizes or pays for AIDS drugs for those without insurance; compliance with Federal disproportionate share payments to hospitals requirements; and others.

3. As described in paragraph 4 of Charlene Brown's Declaration submitted in support of Defendants, Motion to Dismiss, the Provider Tax Amendments require that a state's health care provider taxes be broad based, uniform, applied to permissible classes of health care providers, and lacking in hold harmless provisions. A state is permitted to submit requests to waive certain provisions of the Amendments if its taxes do not meet these statutory criteria. Whether such waivers are granted is governed by Federal Regulations at 42 C.F.R. Part 433.50 et seq.

4. The penalty if a health care provider tax is found by HCFA to be impermissible is a reduction in a state's allowable Medicaid expenditures by a dollar amount equal to the revenues collected from the impermissible tax, which results in a loss of federal financial participation ("FFP"). It is generally believed by HCFA (with whom the State does not concur) that all health care provider taxes result in a matching Federal Medicaid dollar reaching the state treasury, thus justifying the reduction in FFP for a tax deemed impermissible. This reduction in FFP is called a disallowance.

5. By two letters dated December 19, 1994, HCFA notified New York:

> The [15] taxes mentioned...do not meet the broad based and/or uniformity requirements contained in section 1903(w)(3)(B) and (C) of the Social Security Act.

and that

> The [4] classes of assessed services mentioned violate section 1903(w)(7) of the Social Security Act and section 42 CFR 433.56 of the implementing Federal Regulation.

The letters asked New York to submit waiver requests for the fifteen tax programs, and "information supporting the permissibility" of the four classes of assessed services.

6. Since January 1995, New York has submitted more than 1200 pages of waiver requests representing over 60 separate submissions for more than 20 different tax programs. HCFA has not acted on any of these applications, even though they have been pending for almost three years, and prior to the cancellation of section 4722(c) of the Balanced Budget Act ("BBA") on August 11, without any meaningful action or communication of any kind by HCFA to the State regarding either the State's health care provider taxes or the pending waiver applications. The failure of HCFA to act or communicate with the State about the waivers, together with the State's inability to confirm whether any state had received HCFA approval of its waivers, caused the State concern about what criteria HCFA was using in processing and evaluating health care provider tax waiver applications, and increased the State's uncertainty about when and under what

circumstances pending waivers would be approved by HCFA.

7. On June 16, 1997, State representatives, including the undersigned, met, at HCFA's invitation, with HCFA officials, including Charlene Brown, to discuss whether or not HCFA was prepared to act on the State's pending waivers. Ms. Brown informed us that HCFA was not prepared to take any administrative action or engage in rule-making at that time, and that any rule making designed to resolve issues with all the states would not be undertaken by HCFA in the foreseeable future. It became apparent as the meeting progressed that the State and HCFA entertained substantial differences in how we interpreted the requirements of the regulations relating to the waiver criteria. The meeting ended without resolving anything and New York intensified its efforts to obtain legislative relief, as HCFA had implied during the meting [*sic*] was the appropriate resolution. The State's effort resulted in section 4722(c) of the Balanced Budget Act of 1997 ("BBA").

8. HCFA's failure to act with respect to the State's taxing program, coupled with its continued inaction on the State's waiver applications and the consequent buildup of potential State liabilities, prompted the State to seek clarifying Federal legislation. The State's efforts led to enactment of the canceled provisions of section 4722(c), which deemed the State's health care provider taxes permissible, and prohibited HCFA from taking any disallowance related to health care provider tax collections for the period October 1, 1992, through May 31, 1997.

9. New York estimates that the total potential liability of FFP prior to the adoption of section 4722(c) for

these taxes was about $2.6 billion for the period October 1, 1992, through March 31, 1997. The enactment of section 4722(c) prohibited HCFA from disallowing any part of that amount.

10. Since the cancellation of section 4722(c) on August 11, 1997, New York has engaged in negotiations with Charlene Brown and other HCFA officials regarding its health care provider tax waivers which are now "formally pending" before HCFA once again. Notwithstanding the clarifying regulatory change that was made on October 15, 1997, HCFA has not granted any waivers relating to New York's health care provider taxes, although the State has been informed by HCFA that some of its waivers will be approved.[1]

11. The effect of the cancellation of section 4722(c) was to restore to HCFA the authority to take a disallowance related to New York's health care provider taxes, an authority which had been removed by enactment of that section. Following the issuance of the October 9, 1997, letter to State Medicaid Directors, meetings were held between the State and HCFA officials where HCFA stated that there would be no resolution of New York's waivers absent resolution of waivers for all states. HCFA has stated that they believe that such global resolution can not be effected without federal legislation. If HCFA now disallows FFP, as threatened in the October 9, 1997, State Medicaid Director' [*sic*] letter, New York State

[1] These waivers include those applicable to inpatient and outpatient assessments on hospitals to fund the SPARCS program and an assessment on Commercial Insurers, which has expired. The estimated value of these three waivers is approximately $30 million.

statute provides for how the impact of disallowance will be shared between the state, the localities and healthcare providers, all of whom will experience losses if such a disallowance is taken.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 25, 1997

/s/ SARAH VAN LEER
SARAH VAN LEER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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CITY OF NEW YORK, ET AL.,
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NATIONAL TREASURY EMPLOYEES UNION,
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UNITED STATES, ET AL.,
DEFENDANTS

Civ. No. 97-2463 (TFH)

SNAKE RIVER POTATO GROWERS, INC.,
ET AL., PLAINTIFFS

v.

ROBERT E. RUBIN, DEFENDANT

DECLARATION

I, MIKE CRANNEY, declare as follows:

1. I am a farmer with farms located in Cassia County, Idaho. My crops include potatoes, sugarbeets and grain.

2. I am a plaintiff in this case and a Director and Vice Chairman of Snake River Potato Growers, Inc., an Idaho agricultural cooperative organized in May of 1997, which is also a plaintiff in this case.

3. On or about July 1996 I attended a meeting of sugarbeet growers in Burley, Idaho, where I learned about certain cooperative tax legislation which had been introduced in the U.S. Congress that would allow certain farmers' cooperatives to acquire the stock of processor companies for cash from owners, who could defer paying tax on the gain on the sale.

4. I learned that Snake River Sugar Company, a sugarbeet farmers' cooperative, planned to take advantage of that legislation if it were passed to acquire the Amalgamated Sugar Company.

5. I joined Snake River Sugar Company as a member in the Fall of 1996.

6. I later learned that, because the legislation had not yet been passed, Snake River Sugar Company acquired the Amalgamated Sugar Company in a transaction with a different structure. I was informed that this alternative structure did allow the seller, in that instance, to defer paying tax on the gain, but with the disadvantages of the cooperative not being able to use the facilities as collateral and of additional expense through higher interest on an unsecured loan. That structure was also difficult and expensive to negotiate and document, and dependent on particular features of the Amalgamated Sugar

situation that would not be present in other purchase situations.

7. From time to time between January 1997, when the Snake River Sugar Company transaction was closed, and August of 1997, I was aware that efforts were still being made to obtain passage of the cooperative tax legislation.

8. In January of 1997, I learned that Ore-Ida Foods, a large potato processor in the state of Idaho, was considering selling one or more of its Idaho plants.

9. About the same time, Potato Growers of Idaho, a farmers' bargaining cooperative which bargains for price but does not acquire or process any potatoes, made the decision to sponsor the organization of a cooperative to handle processing and marketing activities for its members and other potato growers. I was then serving on the board of Potato Growers of Idaho and took steps in coordination with others to cause plaintiff, Snake River Potato Growers, to be organized in May of 1997. I was informed that Snake River Potato Growers was being organized and structured in such a way that it would be eligible to take advantage of the pending cooperative tax legislation.

10. One of the principal goals and objectives of Snake River Potato Growers was to acquire storage and processing facilities in order to enhance the marketing of potatoes of its members.

11. While Snake River Potato Growers was being organized, the organizers arranged for our legal counsel to make contact with Ore-Ida Foods to determine the availability of a plant for purchase by Snake River Potato Growers. On or about February 1997 information concerning the pending tax legislation

was furnished at the organizers' instruction to Ore-Ida Foods in order that they might understand the tax benefits of selling facilities to a cooperative.

12. Before our cooperative could be organized and funded, Ore-Ida Foods sold its Idaho facilities to McCains, a Canadian agribusiness company.

13. If they own and control storage and processing capacity, farmers are more able to avoid price swings and take advantage of favorable pricing through storing and marketing their crops at opportune times. Conversely, when processing firms combine, the farmer is left with fewer potential customers competing for his crops, and he is even more at their mercy with respect to prices.

14. There are ample processing facilities in the state of Idaho, making it preferable to acquire companies that own existing facilities rather than to build new ones. Many processing facilities were constructed many years ago and are typically still in the hands of original owners, many of whom will realize substantial capital gains upon the sale of their facilities.

15. One investor-owned processor company can acquire another investor-owned processor company tax-free through the exchange of stock. Agricultural cooperatives are not able to do such exchanges of stock because their stock cannot be held by anyone who is not a member of the cooperative.

16. In addition to myself, several members of Snake River Potato Growers who raise sugarbeets in rotation observed the expensive, complicated, and lengthy process of acquiring the sugar plants of Amalgamated under the structured transaction, be-

cause the cooperative tax legislation was not available. It was my understanding that Snake River Sugar Company had negotiated a lower price for the Amalgamated plants because of the tax deferral.

17. I am informed that the Cooperative Tax Act was enacted on August 5, 1997, and believed that the Cooperative Tax Act was enacted for the specific purpose of enabling cooperatives like Snake River Potato Growers to acquire processing facilities more easily because the sellers would be able to defer their taxes.

18. Snake River Potato Growers had concrete plans to utilize the cooperative tax legislation to acquire facilities.

19. On or about May 1997, I spoke with Howard Phillips, the principal owner of Idaho Potato Packers, concerning the possibility that, if the Cooperative Tax Act were passed, Snake River Potato Growers might purchase a Blackfoot, Idaho processing facility in a transaction that would allow the deferral of gain. Mr. Phillips expressed an interest in such a transaction if the Cooperative Tax Act were to pass. Mr. Phillips also acknowledged to me that Jim Chapman, our General Manager, had engaged him in a previous discussion concerning this matter.

20. During the last year, members of Snake River Potato Growers, including myself, sold potatoes to many processors with facilities in Idaho, including Idaho Potato Packers. It is my understanding that during the period Idaho Potato Packers and many other processing facilities in Idaho acquired more than 50% of their potatoes from members and farmers eligible to become members of Snake River Potato Growers.

21. My discussion with Phillips was based on the assumption that Congress would soon pass legislation allowing Phillips and other owners to defer the tax on the gain on the sale of the Idaho Potato Packers facility to Snake River Potato Growers. It is clear to me, as the owner of a farm and other property, that an owner of a major asset will generally want a higher price, and may be unwilling to sell at any price acceptable to a would-be buyer, if he cannot defer the tax on his capital gain. Although I am certainly not an expert on tax matters, I am well aware that (a) it is always better to pay taxes later rather than sooner; (b) the tax law often makes it advantageous for individuals to keep major assets until death rather than sell them; and (c) competing buyers, such as agribusiness corporations, that can offer tax-deferred stock for stock transactions, have a very big advantage over farmers' cooperatives in purchasing processor companies unless the farmers' cooperatives can also offer tax-deferred transaction.

22. It was my understanding that IPP could readily have placed the facility in a wholly owned subsidiary, which IPP would then sell to Snake River Potato Growers, leaving Snake River Potato Growers with 100% of the stock of the processor company, as required by the vetoed tax provision.

23. Congress did pass legislation—the Cooperative Tax Act at issue in this case-that would have allowed IPP and other owners to defer the tax on the gain on the sale of the Idaho Potato Packers facility to Snake River Potato Growers, but on August 11, 1997, President Clinton cancelled that legislation.

24. The President's cancellation of the Cooperative Tax Act caused me to terminate discussions with Phillips about the possibility of Snake River Potato Growers buying the Idaho Potato Packers facility. It was clear to me, for the reasons I have stated, that IPP Sellers and other owners would demand a higher price, and might be unwilling to sell at any acceptable price, without the tax deferral provided by the Cooperative Tax Act.

25. It is my understanding that, just before Congress adjourned in November 1997, legislation passed in the House that would have allowed sellers of processing company stock to defer paying tax on the gain realized in a sale to an eligible farmers' cooperative, but that this measure never passed the Senate. Although this legislation was in some ways similar to the Cooperative Tax Act vetoed by the President in August, it was considerably more narrow and would have made it significantly more difficult for Snake River Potato Growers to acquire, at tax deferred prices, processing facilities in general and the IPP facility in particular. Among other things, Snake River Potato Growers could not have purchased stock of many facilities, including the IPP facility, on a tax-deferred basis for several years because those facilities would not have acquired more than 50% of their potatoes from Snake River Potato Growers (and its members) for three of the five years before the sale, as would have been required under the new legislation. The vetoed tax provision, in comparison, only required that this 50% requirement be met for the one year prior to the sale.

26. Snake River Potato Growers still wishes to buy processing facilities. I believe that IPP remains

interested in selling the IPP facility if a sale can be completed on a tax-deferred basis. Snake River Potato Growers is also actively working on identifying other processing facilities for possible future purchase if the President's cancellation of the Cooperative Tax Act is reversed.

27. The matters set forth in this declaration are based on my personal knowledge, and, if called as a witness, I could and would testify competently thereto.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge. Executed on November 24, 1997.

/s/ MIKE CRANNEY
MIKE CRANNEY

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20615

December 1, 1995

Dear Colleague:

We urge you to cosponsor H.R. 2676, legislation introduced last week to provide American farmers a more firm economic footing and more control over their economic destiny. We believe this proposal will help farmers, through their cooperatives, purchase facilities to refine and process their raw commodities into value-added products.

As U.S. farmers prepare for 21st century agriculture, it is important that we consider options to help our farmers respond to these challenging times. Our bipartisan legislation does just that.

In agriculture as a whole, refining and processing of commodities represent an ever increasing share of total profit. It was not too long ago that farm commodities represented about 40 percent of the cost of the final product purchased by the consumer. Today, however, this percentage on average has decreased to under 25 percent and continues to decline. It is important that American farmers increase their ownership stake in processing and refining to succeed in an increasingly competitive market.

H.R. 2676 is simple and straightforward. It allows the sale of processing and refining facilities to a farmers' cooperative and defer the gain as long as the proceeds from the sale is reinvested. To qualify,

the sale must be made to a farmer owned-and-controlled cooperative whose members produce a majority of the agricultural products that are refined or processed by the facility being purchased.

This provision is similar to treatment available to the owners of businesses that sell to Employee Stock Ownership Plans (ESOPs) and employee-owned coops. H.R. 2676 amends section 1042 of the Internal Revenue Code to give a similar incentive for sales to qualifying farmers' coops. It is tightly drafted to avoid abuse while still accomplishing the goal of giving farmers more control over some of the most profitable activities of agricultural production. It is also similar to numerous other provisions in the tax code that allow for the deferral of gain on many types of transactions.

This change is long overdue. It will encourage farmers to help themselves in a more market-oriented environment by vertically integrating. If this legislation is passed, we are confident that, 10 years from now, we will look on this bill as one of the most beneficial actions Congress took for U.S. farmers.

If you want to join us in cosponsoring this important initiative, please call Dave Ebersole at 53?42 or Jasper Hamilton at ?6605.

Sincerely,

/s/ PAT ROBERTS
PAT ROBERTS

/s/ CHARLIE STENHOLM
CHARLIE STENHOLM

FOR IMMEDIATE RELEASE
CONTACT: McCALL CAMERON
MAY 30, 1997
202/226-8052

HULSHOF INTRODUCES
FARMER-FRIENDLY LEGISLATION

Joined by agriculture producers and farm cooperative organizations, U.S. Representative Kenny C. Hulshof (R-MO) today announced the introduction of a bill designed to give tax incentives that will give a competitive edge to farm cooperatives for the purchase of processing facilities.

The Agriculture for the 21st Century Act (HR 1752) will allow owners of agriculture refining and processing facilities—such as facilities that process corn, soybeans, and livestock—to defer taxes paid if they sell to a farm cooperative. The sellers of these processing facilities would be required to reinvest the capital gains from the sale in order to qualify for tax deferment.

"This legislation means farmers and farmer-owned cooperative organizations can more readily participate in the risks and rewards of food processing," Hulshof said. "A corn farmer will not only benefit from the sale of the corn at the grain elevator, but will also be able to share in the proceeds of the sale of cereal. Similarly, a soybean producer can potentially profit from the sale of cooking oil, rather than just on the sale of the soy beans."

"HR 1752 will also increase our international competitiveness and potentially lower consumer costs because it creates better efficiencies in food production and allow farmers through their farm cooperatives to be vertically integrated in the production of value-added products," Hulshof added.

"This is truly a winning situation for everyone that will help farmers make the transition to the market-based agriculture economy of the 21st Century," Hulshof stated.

HR 1752 enjoys bipartisan support. Among others, Representative Bob Smith (R-OR), Chairman of the House Agriculture Committee, Representative Charlie Stenholm (D-TX), the senior Democrat on the Agriculture Committee, and Representative Jo Ann Emerson (R-MO), have all added their names as original cosponsors. HR 1752 also has the strong support of, among others, the American Farm Bureau Federation, the Missouri Farm Bureau, Missouri Corn Growers, Missouri Soybean Association, the National Council of Farm Cooperatives, and MFA.

Bill Summary & Status for the 105th Congress

Item 1 of 1

PREVIOUS BILL:ALL | NEXT BILL:ALL
NEW SEARCH | HOME | HELP

H.R.1752

SPONSOR: *Rep Hulshof*, (introduced 05/27/97)

RELATED BILLS: *S.872*

TITLE(S):

* OFFICIAL TITLE AS INTRODUCED:

A bill to amend to Internal Revenue Code of 1986 to provide for the nonrecognition of gain on sale of stock to certain farmers' cooperatives.

STATUS: Floor Actions

*****NONE*****

STATUS: Detailed Legislative History

House Actions

May 27, 97:

Referred to the House Committee on Ways and Means.

Aug 5, 97:

See H.R. 2014.

STATUS: Congressional Record Page Reference

*****NONE*****

COMMITTEE(S):

* COMMITTEE(S) OF REFERRAL:

House Ways and Means

AMENDMENTS(S):

NONE

14 COSPONSORS:

Rep Stenholm - 05/27/97
Rep Crapo - 05/27/97
Rep Smith, R - 05/27/97
Rep English - 05/27/97
Rep Barrett, B - 05/27/97
Rep Emerson - 05/27/97
Rep Herger - 05/27/97
Rep Thurman - 05/27/97
Rep Combest - 05/27/97
Rep Minge - 05/27/97
Rep Sensenbrenner - 05/27/97
Rep Canady - 05/27/97
Rep LaHood - 05/27/97
Rep Ewing - 05/27/97

SUMMARY:

(AS INTRODUCED)

Amends the Internal Revenue Code to provide for the nonrecognition of gain on sales of stock of a qualified refiner or processor to an eligible farmer's cooperative.

Remarks on Line Item Vetoes of the Balanced Budget Act of 1997 and the Taxpayer Relief Act of 1997 and an Exchange With Reporters

August 11, 1997

The President. Last week we took historic action to put America's economic house in order when I signed into law the first balanced budget in a generation, one that honors our values, invests in our people, prepares our Nation for the 21st century.

It includes the largest increase in college aid since the GI bill, the largest increase in children's health since the creation of Medicaid over 30 years ago, tax cuts that are the equivalent of a $1,000 raise in take-home pay for the average family with two children, and much more that is good for America.

The new balanced budget law also offers the first opportunity to use a powerful new tool to protect taxpayers: the line item veto, a tool designed to fight against waste and unjustifiable expenditures, to ensure Government works for public interests, not the private interest.

In the past, good legislation could be cluttered up with unjustifiable or wasteful spending or tax provisions, leaving the President no choice but to sign or veto the overall legislation. With the line item veto, the President can sign an overall bill into law that cancel a particular spending project or a particular tax break that benefits only a handful of individuals or companies.

Forty-three Governors throughout our Nation already have the line item veto power. Last year I signed the Federal line item veto into law. Last

month the United States Supreme Court, on procedural grounds, rejected a challenge to this authority. Today, for the first time in the history of our country, the President will use the line item veto to protect taxpayers and to ensure that national interests prevail over narrow interests.

In reaching agreement with Congress on how to balance the budget, we worked very hard to be fair to all Americans and to avoid wasting our citizens' tax dollars. For the same reason, I've asked the members of my administration to work carefully over the final legislation to identify any specific spending or tax provisions that I should consider canceling. Here's what I told the budget team.

First, any provision I cancel must be one that was not included-and let me emphasize-not included-as a part of the balanced budget agreement process with Congress. Our agreement was entered into in good faith, and I will keep it. Second, any provision I cancel must be one that benefits just a few individuals, corporations, or States at the expense of the general interest. Finally, any provision I cancel must be one that is inconsistent with good public policy. Just because something benefits a small number of people doesn't necessarily mean that it hurts the public interest or the American people at large.

After careful scrutiny and numerous meetings with my staff and Cabinet members, we have found three provisions that meet those criteria. In a few moments I will use the power of the line item veto to cancel a provision that would allow financial service companies to shelter income in foreign tax havens to avoid all U.S. taxation. I will also cancel a provision that singles out New York by allowing it to tap into the Federal Treasury to reduce its State

expenditures through the use of health provider tax to match Federal Medicaid dollars that are impermissible in every other State in the country and actually in existence now in several other States. No other State in the Nation would be given this provision, and it is unfair to the rest of our Nation's taxpayers to ask them to subsidize it. Finally, I will cancel a provision that, though well-intended, is poorly designed. This provision would have allowed a very limited number of agribusinesses to avoid paying capital gains taxes, possibly forever, on the sales of certain assets to farmers' cooperatives. And it could have benefited not only traditional farm co-ops but giant organizations which do not need and should not trigger the law's benefits.

Because I strongly support family farmers, farm cooperatives, and the acquisition of production facilities by co-ops, this was a very difficult decision for me. And I intend to work with Congressman Stenholm and Hulshof and Senators Daschle, Dorgan, and Conrad and other interested Members of the Congress to redesign this effort so that it is better targeted and not susceptible to abuse.

The actions I take today will save the American people hundreds of millions of dollars over the next 10 years and send a signal that the Washington rules have changed for good and for the good of the American people. From now on, Presidents will be able to say no to wasteful spending or tax loopholes, even as they say yes to vital legislation. Special interests will not be able to play the old game of slipping a provision into a massive bill in the hope that no one will notice. For the first time, the President is exercising the power to prevent that from happening. The first balanced budget in a generation is now also the

first budget in American history to be strengthened by the line item veto. And that will strengthen our country.

And now I want to go and sign these provisions.

[The President signed the cancellation letters.]

Q. Mr. President, is that the only pork you can find in that budget?

The President. I think that my staff is going to brief you abut it, but let me say that they have—the relevant Cabinet and staff members have gone over this quite extensively. Keep in mind, the primary use of the line item veto overwhelmingly was meant to be in the appropriations process, which is not even started yet. I don't have the first appropriations bill.

There are only a few spending items in this balanced budget that are part of the so-called entitlement process, so that—for example, you had the New York Medicaid provision there on provider taxes. With regard to the taxes, there were some 79 items certified to me, but that was only because of their size, that is, the number of people affected by it. Of those 79, 30, or more were actually recommendations by the Treasury Department to fix flaws in the present laws or to ease the transition in the tax laws. And another dozen or more were put in by Congress by agreement with the Treasury Department to fix procedural problems in the law. Then there were a number of others that I agreed were good policy. So these are the ones that I think—and then there were several others that I might have line-item-vetoed, but they were plainly part of the understandings reached with Congress as a part of the budget process. So these seemed to me to be the ones, after being briefed by my staff, that both involved significant amounts of money

and met the three criteria that I mentioned. And I believed it was the appropriate thing to do.

Q. May I ask another way, sir, the last question another way? Were these the most glaring examples of why you were given this power and, therefore, they might hold up better in a court challenge.

The President. Well, I wouldn't say that. I expect the most glaring examples to come up in the appropriations process, at least if the past is any prologue. Now, it may be that the use of the line item veto here will mean that it won't have to be used as much in the appropriations process, and that would please me greatly. But I think it's important that the American people understand that when the line item veto was given to the President, the primary assumption was that it would take out special projects that were typically funded in big bills, and those are those big appropriations bills, none of which have come to me yet.

But I do believe that this should withstand court challenge because the process by which the matters were reviewed at least was very careful, exhaustive process, and I received input from people all over the country that had interests in it, through my Cabinet and staff members. But we worked very hard on this, and—well, since I told you after my press conference on Thursday that I would be meeting with my staff, and I had meetings and conversations each day since then before finally making the decisions.

Clair [Clair Shipman, CNN].

Q. Mr. President, it sounds as though, given the deliberations among your staff and the talk about the court challenges and the difficulty finding items in this particular tax and spending legislation, that

you decided to act now largely for symbolic reasons instead of—

The President. No, I wouldn't say that. I think these three things are appropriate. But I just want to point out that I think that when the Congress certified, for example, 79 tax items to me, people said, "Well, maybe you ought to veto 76 of them." And I think it's important to recognize that there really never were 79 candidates for line item veto there. The Congress is required—the Joint Tax Committee is required by law to certify to the President all the tax items that benefit fewer than 100 people, and there were—the vast majority of those were either put in by the Treasury Department to actually clean up procedural problems in the law so that the numbers were smaller.

Then there were a number of things that, as I said. I might well have line-item-vetoed, but they were part of the overall budget process and that did a lot of good for the American people and I have to honor the agreements that were made and the process of it.

So these things I hope will be both real and symbolic in the sense that I'm hopeful that this will work out pretty much the way it did when I was Governor: that is, when you know the President is prepared to use the line item veto, that tends to operate as a deterrent against the most egregious kinds of projects that would otherwise not be funded. So it would suit me if, after a while, the use of the veto became quite rare because there was a disciplined agreement not to have projects that ought not be funded in the first place.

Q. Sir, can you tell me where in the Constitution the President is given this kind of power that hasn't been exerted until now?

The President. Well, the power is given by legislation. The real question is, does the Constitution permit or forbid the Congress to give the President this kind of power. I believe that since—if you look at the fact that 43 States have this power for the Governor, and it has been upheld in State after State after State, the provisions of most State constitutions are similar to the provisions of the Federal Constitution in the general allocation of executive authority and legislative authority.

So I think it is an implicit thing. As long as the legislature has the right to override the executive, then for the legislature to allow the executive to make reasoned judgements abut particular items in these omnibus bills, I do not believe is an unconstitutional delegation of the legislature's authority to the President.

So keep in mind, they can override this. If they decide that they think I'm wrong, and two-thirds of them agree, they can override this.

Q. Do you welcome a challenge?

Q. Mr. President, Senator McCain sent you a note last week saying you ought to consider putting off a line item veto until you get the appropriations bills, on the grounds that it might be a blow to the spirit of cooperation that produced the tax cut and the balanced budget bills in the first place. Did you give that any consideration?

The President. Absolutely. And when Senator McCain came to see me about the campaign finance issue and our common support for his legislation, we talked about it a little bit. As I've already said to you, that one of the reasons that we have decided on a relatively small number is I didn't want to touch anything that I thought where there was even

a question that it might have been part of the negotiating process and a cooperative spirit with Congress.

If you look at these three things, they present three entirely different problems, but I think all three are outside the scope of the budget negotiating process and all three are kinds of things that line item veto was meant for: the first, the avoidance of Federal taxation in an inappropriate way; the second, giving a break to one State in a way that would immediately disadvantage several others and potentially disadvantage all the other States; and the third, as I said, I believe a very worthy goal, having incentives for farmers' co-ops to integrate with production facilities in a way that is overbroad and could lead to the total avoidance of taxation under circumstances, which are inappropriate, which would require a more disciplined fix. I think those are the kinds of things that the line item veto was meant to deal with these contexts.

Now, when you get to the appropriations process it will be somewhat more straightforward: Should this project be built or not; should this road be built or not; should this money be given to this agency or not for this program? And I think that those are the things where typically it's in use at the State level. But in the context of taxes and the entitlement, I thought each of these three things presented a representative case where the veto was intended to be used.

Q. Are you running out of travel money, sir? [*Laughter*]

The President. I hope not; I'm trying to go on holiday. [*Laughter*]

Note: The President spoke at 12:30 p.m. in the Oval Office at the White House. The President signed cancellations affecting Public Law 105-33.